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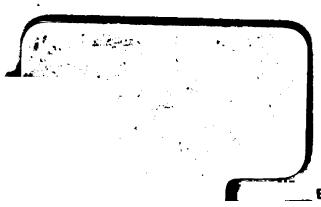

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ELECTION PETITIONS.

REPORTS

OF THE

DECISIONS OF THE JUDGES

FOR THE TRIAL OF

ELECTION PETITIONS

IN ENGLAND AND IRELAND,

PURSUANT TO

THE PARLIAMENTARY ELECTIONS ACT, 1868.

BY

EDWARD LOUGHLIN O'MALLEY, Esq.,

AND

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BARRISTERS-AT-LAW.

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CASE I.

BOROUGH OF WATERFORD.

BEFORE MR. BARON HUGHES, JAN. 20, 1870.

Petitioners: Messrs. Slattery and Corrigan.

Respondent: Sir Henry Winston Barron, Bart.

Counsel for Petitioners: Mr. Serjeant Armstrong; Mr. Hackett.

Agents: Messrs. Strange and Wall.

Counsel for Respondent: Mr. Heron, Q.C.; Mr. Waters, Q.C.; Mr. Crean.

Agent: Mr. Robert Barron.

THE petition contained the usual allegations of bribery, &c., and prayed the seat for the unsuccessful candidate, Mr. Ralph Bernal Osborne.

It appeared that the Respondent had stood as a candidate for the borough off and on for 38 years; that after the election of 1865 he had made payments to persons who had voted for him partly out of charity, and partly as compensation for their votes. For the election of 1868, he appointed as his personal agent a relation, named Marcus Barron. At the time of, and immediately after the election of 1868, considerable bribery was carried on by an organised system of payments made by one Allen, who had received money from one Wall, who had got what he paid to Allen from Marcus Barron. Within twelve months of the election of 1868 the present election took place, and it was proved that at this election several persons were bribed by Allen in the same way as at the previous election.

In the course of the case,

Inference as to agency from agency at previous election.

It was proved that at the previous election in 1868, which took place less than twelve months before the present one, the Respondent had appointed his cousin, Marcus Barron, to act as his personal agent. At that election Marcus Barron had handed over various sums of money to be employed in bribery to one Wall, who passed it on to one Allen, and an organised system of bribery was carried on by Allen with this money. At this election Marcus Barron continued to act as before for the Respondent, but Wall ceased so to act, and it did not appear that there was any regular reappointment of Allen as agent, or that he was in any way authorised on this occasion to canvass for the Respondent. However he did canvass for the Respondent in the same way as he had done previously, and it was proved that he bribed several voters.

25. Mr. Baron HUGHES, in his judgment, said, as to the liability of the Respondent for Allen's act at this election :—

"One of the consequences of that organised system of bribery which existed at the last election, and so short a time ago, was, in my opinion, this, that it would be difficult, scarcely possible, for the Respondent to sever his present election from it. I think if he had placarded Mr. Allen's house from top to bottom 'no longer agent of mine,' it would not in itself have severed the connexion : it would still be a subject for the decision of a judge occupying this place, whether it was *bonâ fide*, or merely an attempt to carry out in another way the object of bribery. There is nothing, in my opinion, which would have severed the connexion but one of two things, either the death of Mr. Allen—his ceasing to live—or to live in this country, or his doing what Mr. Wall did, going over to the opposite side. There is nothing else by which a judge would be conclusively bound to declare that the connexion was severed."

Decision as to validity of vote challenged on scrutiny, not to be given till principal case finished. (1) 2.

Mr. Serjeant *Armstrong*, in opening the Petitioner's case, submitted that the evidence he was about to offer as to one Gaule having been bribed, would be applicable not only to the principal case, but also for the purpose of invalidating the vote of Gaule upon the scrutiny.

Mr. *Heron*, for the Respondent, submitted that in the first

instance, and until the principal and recriminatory cases were finished, no decision should be given as to the validity of any individual vote, and that when the period of the trial arrived for the scrutiny, he, Mr. Heron, would be entitled to make his statement, and go into evidence, and have his lordship's decision on each vote separately.

Mr. Baron HUGHES acceded to the arrangement.

Conversation after election over inadmissible without previous proof of agency. (1) 18.

A witness, Gaule, who was called to prove that he had been bribed by one Allen, stated "about two o'clock on the polling day, a voter, Cahill, came up to me. I asked him 'what news?' he said 'Good news, come with me to Mr. Allen.' So we went. When we found Mr. Allen he put down my name in a book, and said, 'Go on, Cahill, and see Gaule vote.'" I then went and voted for the Respondent.

Gaule was then asked,

(1) 19.

"Had you any conversation with Cahill after the election was over?"

Mr. *Heron*, for the Respondent, objected that before agency was proved, what Cahill said after the election was over was not evidence, though what he said before the election was over might be.

Mr. Baron HUGHES:—"Is it denied that Cahill is an agent of the Respondent?"

Mr. *Heron*:—"Certainly."

Mr. Baron HUGHES:—"If he was an agent, I apprehend the conversation the next day would be just as much evidence as a conversation taking place while the election was going on."

Mr. *Heron*:—"Certainly, but at present there is not the slightest proof of Cahill being our agent."

The question was not put.

Order for attendance of witness when granted. (3) 238.

Mr. Serjeant *Armstrong* applied for an order for the attendance of one John May. He stated that the process server had used every effort to serve him with a subpœna, but without effect, though there was reason to believe he was in his house.

The application was granted.

(3) 310. Mr. *Heron* applied for an order for the attendance of one Brophy.

Serjeant *Armstrong* submitted that before the order was made some proofs should be given of the attempts to serve with a subpœna.

The bailiff was then called, but from his evidence it appeared that he had only once attempted to serve him, whereupon

Mr. Baron HUGHES declined to make the order.

Particulars. Effect of limiting evidence. (4) 1. Upon one Delany being called as a witness to prove that he had been bribed,

Mr. *Heron* said that if it was sought to set aside his vote on the ground that he had been bribed, he must object on the ground that his name was not in the particulars.

Serjeant *Armstrong*:—"We did not discover his name till Saturday" (it was then Monday).

Mr. Baron HUGHES to Mr. Heron:—"If anything should arise you shall have the amplest opportunity of meeting the case. There is not a man in Waterford that I will not have here if he can give any information."

Witness not appearing, examination deferred. 6 (130). At the close of the Petitioner's case,

Mr. Serjeant *Armstrong* asked that liberty should be reserved to him to examine a witness, Smith, who had been called up on his subpœna, but had not appeared.

Mr. Baron HUGHES stated that up to the last moment of the trial he would hear any application for the examination or re-examination of any witness, if he was satisfied that it was *bonâ fide* and could not have been done before.

Mr. Baron HUGHES, in his judgment, declared the election of the Respondent void on the ground of bribery by agent. He also declared that the recriminatory case had failed, and the Petitioners had failed upon the scrutiny in establishing the claim of Mr. Osborne to the seat.

Costs. As to costs, he said:—

"This petition has succeeded, and the recriminatory case has failed, therefore the Petitioners are entitled to their costs of this

petition, properly and necessarily incurred. But I wish it to appear upon the face of my judgment, in awarding these costs, that I exclude expressly the costs of all the witnesses who have not been examined. Of necessity growing out of the nature of the case—it being necessary to subpœna every one who appeared to be open to the suspicion of corruption—subpœnas were served upon almost every voter on the Respondent's side. I think that is an expense, which in point of speculation it was necessary for the Petitioners to incur, but which in point of burden ought not to be thrown upon the Respondent."

As to the costs of the scrutiny,

Mr. *Heron*, for the Respondent, applied that the costs of those days which had been consumed in going into cases in which the Petitioners failed might be borne by the Petitioners in accordance with the decision in the Londonderry case.*

Mr. Baron HUGHES :—"I have looked at the case, and I have come to the conclusion that I ought not to follow it here for this reason. Substantially all the witnesses produced for the scrutiny were absolutely necessary for the general case, and in this case, more perhaps in any other that I know of, the scrutiny was of necessity mixed up with the avoidance of the seat. The whole costs of the scrutiny must therefore be borne by the Respondents."

* Vol. i. 279.

CASE II.

COUNTY OF LONGFORD.

BEFORE RT. HON. MR. JUSTICE FITZGERALD, MARCH 28, 1870.

Petitioners: Messrs. Broderick and others.

Respondent: Hon. Reginald Greville-Nugent.

Counsel for Petitioners: Mr. Butt, Q.C.; Mr. Exham, Q.C.; Mr. Munroe.

Agent: Mr. Hanly.

Counsel for Respondent: Mr. Serjeant Armstrong; Mr. McLaughlin.

Agent: Mr. Reynolds.

The petition commenced by alleging—

1. That on Thursday, December 23, 1869, a writ of election was issued out of the High Court of Chancery in Ireland to the high sheriff of the County of Longford for the election of a member to serve in parliament for the same county.
2. That the said writ was duly received by the said sheriff on Friday, December 24.
3. That the said sheriff gave no notice of holding any election pursuant to the said writ within two days of the receipt of the same, as required by the statute in that case made and provided.
4. That on Monday, December 27, the said sheriff caused notice to be given of an election to be held on Friday, December 31. . . . . being a day sooner than

the sixth day from the date or giving of the said notice.

And it went on to state in paragraph 37

That the said election was illegally held by the said sheriff because the notice for the said election was not given within two days after the receipt of the writ, and also because six days' notice of the said election was not given as required by the statutes in that case made and provided, the said election having taken place sooner than the sixth day from the signing and giving of the said notice.

The petition further contained the usual allegations of bribery, undue influence, and treating both by the Respondent himself and also by his agents.

All the charges in the petition broke down, except that of treating, as to which it was proved that drink had been distributed in such a systematic way both to electors and non-electors that the treating was corrupt within the meaning of the statute.

Before the commencement of the case,

1. Irregularity as to time of holding election.

Mr. *Butt*, for the Petitioners, called the attention of the Court to the first four allegations in the petition, and submitted that the election was void on the grounds there stated. By 1 Geo. 4, c. 11, s. 5, it is enacted "that immediately after the receipt of the writ for making an election for any county in Ireland the sheriff shall endorse thereon the date of receiving the same, and shall within two days after the receipt of such writ cause proclamation of the time and place of holding such election to be made, and on the same day give public notice of a special County Court to be holden for the purpose of the election," which election (the Act goes on to say) shall be holden on some day not later from the day of making such proclamation than the 16th day and not sooner than the 10th day. This Act is amended as to the day for holding the election by 25 & 26 Vic. c. 92, s. 1, which enacts that the day for holding the election shall be not later from the day of making the proclamation than the twelfth day, and not sooner than the sixth day. Again by 31 & 32 Vic. c. 112, s. 38, the Act of

25 & 26 Vic. c. 92, s. 1, is amended by enacting that the election is not to be held sooner than the fourth day after the proclamation. In this case the sheriff received the writ on Friday, December 24, but did not make the proclamation until Monday, 27th, and fixed the election for Friday, 31st. Under these circumstances, he contended that the election was void, inasmuch as the proclamation was not made within two days after the receipt of the writ.

Mr. Justice FITZGERALD stated that at present his opinion was adverse to Mr. Butt's contention as to the election being void, but that if necessary, he would call upon Mr. Serjeant Armstrong to answer it.*

In the course of the case,

Amendment of particulars in consequence of facts subsequently discovered. 12.

The following decisions were given as to the amendment of particulars by adding names of persons charged with corrupt practices.

A witness, Murtagh, was asked by Mr. Exham, for the Petitioners, as to a statement made by one Father Skelly, in order to prove that Father Skelly had been guilty of intimidation,

Whereupon Serjeant *Armstrong*, for the Respondent, objected that Skelly's name was not in the bill of particulars.

Mr. *Exham*:—"Mr. Skelly's name is not in the particulars, but I propose to call Mr. Hanly, the agent for the Petitioners, to prove when this fact came to his knowledge."

Mr. Justice FITZGERALD:—"At present you have laid no foundation for giving in evidence any statements made by Father Skelly. I will give you the greatest latitude I can. Do you say that these statements were followed by acts?"

Mr. *Exham* said that they were, and he then applied for leave to insert in the particulars Father Skelly's name as guilty of intimidation.

Mr. Justice FITZGERALD said that some foundation must be laid for the insertion of that name before he could accede to the application.

* As the election was declared void on other grounds, it became unnecessary to decide this point.

In order to lay that foundation, the Petitioners' agent, Mr. Hanly, was called as a witness, and stated that it was not until the Saturday previous (that being Monday) that he had heard that Mr. Murtagh could give any evidence as to any interview between himself and Father Skelly. He admitted, however, in cross-examination, that he did not go down to Longford at all himself to prepare instructions for the Petitioners: neither had he any agent down there, and that the bill of particulars furnished was made up from loose information obtained from third parties without any due inquiry.*

Mr. Justice FITZGERALD, in this particular instance, allowed the particulars to be amended by the insertion of Father Skelly's name, and in his judgment, he said further as to this:—

"Undue clerical influence is so great an evil that I did not hesitate for a moment, when it was stated that the case was of that character, to permit the amendment of the particulars, with a view to bring that case before the Court, and I offered at any subsequent stage freely to amend the bill of particulars with a view to give an opportunity of proving any other case of that character."

When amendment not allowed.

Upon a witness, Mrs. Elizabeth Lee, whose name was not in the list, being called to show that she had been bribed,

Mr. Justice FITZGERALD stated that, inasmuch as it had appeared from the evidence of the Petitioners' agent that there had not been sufficient inquiry into the matters which it was intended to bring forward, he would be very slow to allow the amendment except on very strong evidence. 74.

Mrs. Lee's case was then withdrawn.

On a subsequent occasion, upon a witness, whose name was not in the particulars, being examined as to having been treated, 104.

Mr. Justice FITZGERALD (upon an objection being taken), said:—"I would not hesitate in a case, for instance, of bribery or undue influence, to give the utmost latitude to the Petitioners, even though the name be not in the bill of particulars, as I did

* See observation by Fitzgerald, J., p. 104, of Minutes of Evidence.

yesterday in the case of Mr. Skelly,* but as to this case of individual treating, which may be quite capable of explanation, and which ought to have been inquired into beforehand, I do not think I ought to depart from the ordinary practice. Though I am here to represent the public, there are individual interests concerned, and even the public may be injured by inquiry into a matter as to which there is no opportunity of giving an explanation."

126. But when evidence as to one Father John Duffy was objected to on the ground that his name was not in the particulars,

Upon Mr. Butt stating that he was charged with employing mobs,

Mr. Justice FITZGERALD allowed his name to be added to the list.

128. Mr. *Butt* again asked leave to amend the particulars by adding the name of five witnesses to prove treating. In support of this application, he cited a decision of Keogh, J., in the *Dublin Case*,† and Willes, J., in the *Coventry Case*.‡

Serjeant *Armstrong* contended that after what had been elicited in cross-examination from the Petitioners' agent,§ it would be giving a premium to inactivity and inattention in getting up a petition, if this application was granted. He hoped that at any rate before the application was acceded to, a strong application would be required. This was done by Martin, B., in the *Cheltenham Case*,‖ and Willes, J., in the *Bodmin Case*.¶

Mr. Justice FITZGERALD said he should require an affidavit stating how the conducting agent obtained the information.

An affidavit was then made by the Petitioners' agent as to the five witnesses.**

* Vide ante, p. 8. † Vol. i. 271. ‡ Vol. i. 105.
§ Ante, p. 9. ‖ Vol. i. 63. ¶ Vol. i. 119.

** The affidavit was as follows:—

"(1). That I have been informed, and believe, that John Cosgrave, of Longford, kept an open house in Greville-Nugent's interest during the late election, and that drinking went on there to a large extent; and I say that I was not aware of this, nor had it been suggested to me, at the time of furnishing the bill of particulars.

"(2). That I have been informed, and believe, that Patrick Farrell, of Longford, on the day of the nomination, and previously, and also on the day of

Mr. Justice FITZGERALD said he would allow the particulars to be amended as to No. 2 and No. 5 of the affidavit, there being something substantial in them.

What questions Petitioners' agent is not privileged from answering. 13.

Upon the agent of Petitioners, Mr. Hanly, being called as a witness for the Petitioners, he was asked in cross-examination by Serjeant Armstrong, for the Respondents—

Q. "From whom did you obtain information as to intimidation?"

Mr. *Butt*, for the Petitioners, objected to the question, and submitted that Mr. Hanly was not obliged to disclose the nature of information he had obtained while preparing his case, or from whom he got it.

Mr. Justice FITZGERALD:—"You cannot be entitled as an attorney to withhold the names of those who gave you information, but you may protect yourself by not disclosing any private information given you by your client."

Mr. *Butt* submitted that that would also apply to any information given to him confidentially.

Mr. Justice FITZGERALD:—"If the parties came in and volunteered to give information, I do not think that it does apply."

What evidence admissible if occurrence

Upon a witness being asked about an occurrence that took place upon the polling day, but after the close of the poll,

polling, distributed large quantities of drink, both to electors and non-electors, and that I have heard he has made a claim against Greville-Nugent of about £200 in connection with the election; and I say that I have heard this fact within the last twenty-four hours.

"(3). That I have been informed that John Feeney, of this town, supplied quantities of drink previous to and during the elections, to voters and non-electors in Greville-Nugent's interest, for which he has made a claim; and I say that I was not aware of this fact until yesterday.

"(4). That I have been informed, and believe, that John M'Dermot, of Dublin-road, in this town, also kept an open house in Greville-Nugent's favour, and supplied drink to electors and non-electors.

"(5). That Patrick Kernan, as I am informed, kept an open house in Greville-Nugent's interest, and has made a claim in foot thereof, in part payment of which he has received £20 from the Rev. James Reynolds; and I say that I did not receive the above information as to John M'Dermot and Patrick Kernan until this day."

after close of the poll. 33.

Mr. *Butt* objected to anything being gone into which took place after the election was over.

Mr. Justice FITZGERALD stated that he would admit anything that occurred on the day of the polling as indicative of what took place during the day.

63.

But afterwards, upon a witness being asked as to something that was said by an agent of the Respondent, twenty-six days after the election,

Mr. Justice FITZGERALD stated that he could not receive evidence of statements made twenty-six days after the election without some evidence, in the first place, to show that the authority of the agent continued after the election was over.

In the course of the Respondent's case,

Order for attendance of witness when granted. 198.

Mr. Serjeant *Armstrong* stated that he should require the attendance of one Murtagh, a witness who had been previously called by the Petitioners.

Mr. Justice FITZGERALD :—"You had better write a letter to Murtagh, and he must be brought back at the Respondent's expense."

216.

On the following day Mr. Murtagh was called, but did not appear.

Mr. Serjeant *Armstrong* therefore asked for an order for his attendance.

The order was granted.

Intimidation by introduction of bodies of men from other places, and organisation of defensive force by the other side.

It was proved that the party who supported Mr. Martin, the unsuccessful candidate, introduced at the election, from several neighbouring counties, for the purpose of intimidation, riot, and disorder, bands of men who had no business there, and who comprised within their ranks the worst characters that could be found in those counties. In consequence of this the Respondent's party organised a defensive force, consisting of great numbers of non-electors, but principally members of the families of the electors. It was proved that this course was taken for the purpose of protecting the outlying voters (many of whom had to come many miles to the poll) from the foreign bodies who had

been introduced in the county, because no sufficient escort of military or police could be obtained; nevertheless that it was contended by this petition that this course was illegal, and was evidence of such intimidation as ought to avoid the election.

Mr. Justice FITZGERALD, in his judgment, said as to this introduction of men from other counties :—

"If Mr. Martin had been returned, and evidence had been laid before me on a petition against him for intimidation by means of those men who were thus brought into the county, I could not for one moment hesitate to consider the election as utterly void. Further, I have to tell those parties, whoever they were, who brought them in here (no matter what their position), with a view to intimidation, riot, and disorder, that they become personally and criminally responsible for the unlawful acts which these their instruments committed."

As to the course taken by the Respondent's party, he said :—

"I am to ask myself the question whether it was legal—that is, whether the enrolment of what I may call a voluntary police was necessary, and if necessary, whether it was legal? It would not have been necessary if a suitable escort of police or military could have been procured. As that could not be done, the necessity for some protection after the introduction of these foreign bodies was obvious; and there being that necessity, I cannot say that the enrolment of a voluntary police for defensive purposes only was an illegal step; but I must add that, although not illegal, it was highly dangerous: it was one rarely to be adopted, except under extreme circumstances, particularly as the parties who adopted it exposed themselves to great peril, and would have had to bear all the consequences which resulted. As I read the evidence, the purpose of the enrolment was not to create intimidation, not to intimidate others, but to prevent those who would otherwise vote for the Respondent from being intimidated. I cannot, therefore, come to the conclusion that there was intimidation on the Respondent's side."

In support of the charge of spiritual intimidation, it was proved that immediately upon a vacancy occurring in the representation

Convention of a meeting exclusively of clergy, how far evidence of spiritual intimidation.

of Longford, a meeting of the Roman Catholic clergy of the county was convened. The meeting consisted exclusively of clergy, and at that meeting the Respondent was accepted as a candidate.

Mr. Justice FITZGERALD, in his judgment, said as to this meeting :—

"I allude to this meeting because it has been made the subject of much commentary, and upon the face of the petition, as well as in the evidence given for the Petitioners, it has been made the foundation of many of the charges which have been put forward. It is not my duty to pronounce upon the policy or expediency of that step so taken by the clergy—that is, the holding in the first instance a meeting confined to the clergy of the county, and their selecting a candidate whose interest they agreed to promote with all their power. All I have to do is to pronounce upon the legality of it, and I am obliged to say that, however objectionable it may have been, it was a lawful proceeding. It was quite as open to the clergy, as electors of the county, as it would have been to any other body of electors in the county, to separate themselves from the general mass of electors, select a candidate, and agree to support that candidate. When we recollect the very great interest which the clergy had in the then pending election, and the crisis which they no doubt considered was imminent, probably it is a course which one would have expected they would take upon the occasion. The objections to it are that it separates the clergy from the laity, it exposes the former to the imputation of what is called 'clerical dictation.' It creates jealousy and uneasiness, and lays the foundation for the charge of undue influence; and there is this quite certain that it calls upon the judge who may have to determine the validity of the election to view with suspicion, and criticise with vigilance, the course which the clergy may take in the contest."

Payments to voters for conveying other voters to the poll, how far allowable.

It was proved that there was considerable difficulty in providing conveyances for voters living at a distance to go to the poll, and that certain voters who owned cars were induced to lend them for the conveyance of other voters, and were paid for so doing. It was contended by the Petitioners that these payments to voters were

mere colourable payments, either as a reward to them for voting or to induce them to vote.

Mr. Justice FITZGERALD, in his judgment, after stating that he had come to the conclusion that this was not a colourable proceeding, made the following remarks upon it:—

"I think it was a step of a very dangerous character; it brought the parties to the very verge of the law, and it would have required very little, if payments were actually made, to come to the conclusion that they were made to influence the vote, and so to void the election on the ground of bribery."

Systematic distribution of drink, where corrupt treating.

It was proved that a considerable sum of money was paid over to an agent of the Respondent for the express purpose of expending it in supplying drink gratuitously. It was professedly given only to non-voters, but those non-voters were, for the most part, the sons, brothers, and relations of electors, and in many instances it appeared that the electors themselves participated in the drink distributed. In fact (as was stated by one of the publicans, of whom drink was ordered, when asked who got it), "Anybody might have had the drink without any distinction."

Mr. Justice FITZGERALD, in his judgment, said as to this:—

"The parties concerned fell into the mistake of supposing that treating to be illegal must be the treating of voters. The treating of non-electors may be illegal and corrupt just as much as the treating of voters."

Having stated his concurrence with Mr. Justice Blackburn's remarks in the *Bewdley Case** as to the bearing of the extent and amount of treating as a whole upon the interpretation of the intention of individual acts of treating, he said:—"I am bound to regard this case as a whole, not to criticise each particular instance of treating, but to consider the whole course pursued from the 7th of December up to and including the day of election; and I am coerced to come to the conclusion that this general systematic treating of non-electors, consisting, as they did, largely of the families of the electors, was corrupt within the meaning of the statute, because it was carried out systematically with the view

* Vol. i. p. 19; see also Vol. i. p. 58, 59.

and intent of keeping up popular excitement, influencing public and individual opinion, promoting the popularity of the candidate, and generally to procure his election."

Mr. Justice FITZGERALD, in his judgment, declared the election void on the ground of corrupt treating.

As to undue influence on the part of the clergy, he said :—

Clerical undue influence discussed.

"The utmost care has been taken by the legislature for the purpose of defining what undue influence is, and of repressing it. By the 5th section of the Corrupt Practices Prevention Act, 1854, it is defined with a view to embrace almost every case of improper influence, whether by physical intimidation or otherwise; and if we were now applying to the legislature to amend the law so as to include any case that might have been omitted, it would be difficult to invent language more comprehensive."

And subsequently—

"In considering what I call here undue clerical influence, it is not my intention in any way to detract from the proper influence which a clergyman has, or by a single word to lessen its legitimate exercise. We cannot forget its wholesome operation, and how often, even recently, it has been the great bulwark of the community against insurrection and fruitless attempts at revolution. The Catholic priest has, and he ought to have, great influence. His position, his sacred character, his superior education, and the identity of his interests with his flock ensure it to him; and that influence receives tenfold force from the conviction of his people that it is generally exercised for their benefit. In the proper exercise of that influence on electors, the priest may counsel, advise, recommend, entreat, and point out the true line of moral duty, and explain why one candidate should be preferred to another, and may, if he think fit, throw the whole weight of his character into the scale; but he may not appeal to the fears, or terrors, or superstition of those he addresses. He must not hold out hopes of reward here or hereafter, and he must not use threats of temporal injury, or of disadvantage, or of punishment hereafter. He must not, for instance, threaten to excommunicate, or to withhold the sacraments, or to expose the party to any other religious disability, or denounce the voting for any particular candidate as a sin, or as an offence

involving punishment here or hereafter. If he does so with a view to influence a voter, or to affect an election, the law considers him guilty of undue influence. As priestly influence is so great, we must regard its exercise with extreme jealousy, and seek by the utmost vigilance to keep it within due and proper bounds."

As to the effect of undue influence upon an election, he said:—

Undue influence, effect on election to be considered.

"Though a person (who is an agent) may be guilty of undue influence, the election is not to be set aside because of an act of undue influence, unless it is one that was calculated to affect, and did affect, the election."*

As to costs, he said:—

"Generally speaking, my view is, and it is the view of most of the Judges, that in inquiries of this kind, costs follow the result, but in this case I do not propose to take that course. I have looked at the petition, supplemented by an extensive bill of particulars, and in many of its allegations it is proved to be unfounded. As to bribery, it is unfounded. A case was made in the petition and in the particulars against the candidate and all his principal supporters of personal bribery. As to mob intimidation, it is unfounded; and I cannot shut my eyes to this, that the corrupt treating, in respect of which I have been coerced to unseat the Member and declare the election void, has been materially the result of the illegal course pursued by the Martin Committee. Upon these grounds I depart from the ordinary rule. I refuse the costs of the petition, and I declare that the parties shall abide their own costs."

* But see Mr. Justice Willes' remarks, as to intimidation, in Northallerton Case, vol. i. 173.

CASE III.

BOROUGH OF MALLOW.

BEFORE RT. HON. MR. JUSTICE MORRIS, APRIL 7, 1870.

Petitioner: Major Knox.

Respondent: Mr. Munster.

Counsel for Petitioners: Mr. Butt, Q.C.; Mr. Palles, Q.C.; Mr. Kaye.

Agents: Messrs. Molloy and Watson.

Counsel for Respondent: Mr. Serjeant Armstrong; Mr. MacDonough, Q.C.; Mr. O'Rearden.

Agent: Mr. Moriarty.

THE petition contained the usual allegations of bribery, &c., and prayed the seat for the Petitioner.

It appeared that there were forty-seven publicans who had votes for the borough. About a fortnight before the nomination one Captain Stewart, the expense agent for the Respondent, gave orders to twenty-two of these publicans to distribute gratis a considerable quantity of porter, tea, sugar, and bread. All these publicans voted for the Respondent, although several of them had previously signed a requisition to Major Knox, the unsuccessful candidate, to come forward. As to the charge of bribery, it was proved that several voters were ready and anxious to sell their votes, but it was not proved that any money was actually given to them.

The recriminatory case broke down, but upon the scrutiny the

Petitioners failed to strike off a sufficient number of votes to seat the Petitioner, Major Knox.

In the course of the case,

It appeared that large rewards—in one instance as much as £200—were offered by the Petitioners to induce persons to come forward and give evidence as to bribery.

Offer of rewards for evidence, legality of. 37.

Mr. Justice MORRIS, in his judgment, said as to this:—

"It is stated, and I believe the fact to be so, that it is not illegal to offer rewards for evidence, and decisions of at least one eminent judge have been referred to in support of this proposition; but of this I am clear, that at all events it should have been limited much more in amount, and that the extravagant proposition of £200 offered in a small town like this certainly was, to say the least of it, extremely dangerous."

In the course of the scrutiny,

The name of one Thomas Barry (who was one of the old 40*s.* freeholders, and held a tenement at a rent of £1 a-year, Irish currency) appeared upon the register. He had been in receipt of parish relief for at least three years before the last revision of the lists, but notwithstanding this, his name had been allowed to remain upon the register; he continued to receive parish relief up to the time of the election; and in fact he came out of the workhouse in the workhouse dress only a few days before the election, for the purpose of voting, and he did vote for the Respondent.

Receipt of parochial relief after registration. 18.

It was argued for the Respondent that his vote was good. No doubt by 13 & 14 Vict. c. 69, s. 111, his name, if objected to before the reviser, would have been struck off the register on account of the receipt of parochial relief, but as it had not been objected to, it was contended that any further parochial relief (given, that is to say, after the revision and before the election), ought not to render the vote invalid.

Mr. Justice MORRIS, in his judgment, said as to this:—

"This vote depends, I apprehend, entirely upon a question of law, and, as I have already announced, if it became the turning point of the case, I would, at the desire of either party, reserve it for the Court of Common Pleas. I shall now, however, state my 19.

opinion so far as I have formed one. I am of opinion that the vote is invalid. By 13 & 14 Vict. c. 69, s. 104, the register is made conclusive, unless the committee (now the judge) shall consider that any vote is invalid, 'on the ground of any other legal incapacity at the time of his voting, which may have arisen subsequently to the expiration of the time allowed for making out the list of voters from which the register of voters in force at the time of such election shall have been formed.' The receipt of union relief is at common law a disqualification to vote, and by common sense it ought to be so in the case where the franchise is a property one. By s. 111 of the same Act, the receipt of Union relief is made a disqualification to be placed upon the register. If, however, a person receiving pauper relief does get upon the register, I am clearly of opinion that, if no subsequent relief is proved, the register would be conclusive, under s. 104. I cannot, however, accede to the argument that because a statutable disqualification to be put upon the register existed at the time of the revision, it can cure a legal incapacity to vote, which arose by the receipt of additional parochial relief after the time of making up the register."

Vote of paid agent of candidate who has retired before the poll invalid.
22.

It appeared that one Edward O'Connor was the paid conducting agent of a Mr. Waters, who had declared himself a candidate, but, previously to the nomination, although subsequently to the issue of the writ, had retired from the contest. O'Connor voted for the Respondent.

Mr. Justice MORRIS, in his judgment, said as to the vote of O'Connor:—

"By 31 & 32 Vict. c. 49, s. 8, 'No elector who, within six months before any election shall have been retained, hired, or employed for all or any of the purposes of the election for reward, by or on behalf of any candidate at such election, as agent, canvasser, clerk, messenger . . . . shall be entitled to vote at such election.' A good deal turns upon the definition to be given to the word 'candidate.' That word is defined by 21 & 22 Vict. c. 89, s. 3, and also by Parliamentary Elections Act, 1868, s. 3, and it was decided in the Youghal case * that the words 'candidate at any election'

* Vol. i. 292, *S.C.*, Irish Common Law Reports, vol. iii., p. 530.

have the same meaning in this last mentioned Act as in that first mentioned. I should, therefore, be of opinion (if it became of consequence to rule it,) that they have also the same meaning in 31 & 32 Vict. c. 49, s. 8, and that accordingly the vote of O'Connor is invalid, but, if necessary, I would reserve the point for the Court of Common Pleas."

Partner of paid agent how affected by 31 & 32 Vict. c. 49, s. 8. 28.

It appeared that the above mentioned * Edward Connor was in partnership, as a solicitor, with his son Antony. Antony O'Connor had voted for the Respondent. He was never personally retained as a paid agent for Mr. Waters, but it was contended that as he was a partner with his father he would, as such partner, be entitled to some share of the money paid to his father by Mr. Waters for acting as his agent, and that this would be a constructive payment of Antony O'Connor by Mr. Waters, which would invalidate the vote of Antony as well as that of his father, under 31 & 32 Vict. c. 49, s. 8.

Mr. Justice MORRIS, in his judgment, said, as to the vote of Antony O'Connor:—

"If two attorneys are partners together, and one of them is employed personally as a paid agent, possibly without the knowledge of the other, surely it cannot be held that if that other votes, he is to be constructively held liable for having committed a misdemeanour. I should therefore be of opinion (if it were necessary to decide it) that the vote of Antony O'Connor is valid, but this point also, if it became necessary, I should be willing to reserve for the Court of Common Pleas."

Offer to sell vote not bribery. 49.

It was proved that four persons, who eventually voted for the Respondent, had before voting offered to sell their votes to either of the candidates. It was not, however, proved that they had been successful in actually getting a bribe from any one. Eventually they all voted for the Respondent. It was contended by the Petitioner that their votes ought to be struck off on the ground that what they had done amounted to bribery, at any rate at

* Ante, p. 20.

common law, if not within the meaning of the Corrupt Practices Prevention Act, 1854.

Mr. Justice MORRIS declined to strike off the vote, and in his judgment, said as follows:—

"It has been urged that I should strike off the votes of these four persons who tendered their votes for sale. It is clear that the vote of every briber should be struck off, and also that of every bribee, no matter by whom bribed, but while the offer to purchase a vote is made bribery by the second section of the Act of 1854, the offering for sale by the voter of his vote does not appear to be so by section 3 of that Act, unless the offer is followed up by an agreement to that effect. It has been urged, however, that it was a disqualification at common law. However, no case has been referred to in which such a class of voters was ever struck off, and I decline to make a precedent here."

Mr. Justice MORRIS, in his judgment, declared the election void on the ground of corrupt treating. As to the principles on which he had acted in coming to a decision, he said:—

Evidence, how to be weighed; evidence of offers not followed by acts. 33.

"I have desired to apply two rules to work out my judgment by; they are shortly these—First, that I should be sure, very sure, before I come to a decision adverse to any party, where his character or credit is involved; secondly, that offers or conversations unaccompanied by any acts should be much more strongly proved in evidence than where some clear definite act has followed the alleged offer or conversation."

As to what constitutes corrupt treating, he cited the following passage from the judgment of Blackburn, J., in the *Wallingford Case*: *—

Corrupt treating defined. 71.

"I think that whenever the intention is by such means to gain popularity, and thereby to affect the election, or even if the case is, as very often perhaps it is, that persons are afraid that if they do not provide entertainment and drink to secure the strong interests of the publicans and the persons who take drink whenever they get it for nothing—who are always a numerous body—they will become unpopular, and therefore, provided it is

* Vol. i. p. 59.

done in order to affect the election, where there is an intention in the mind of the candidate or the agent to produce that effect, it is corrupt treating, and the seat ought to be vacated."

As to costs, he said:—

"I see no reason to depart from the general rule applicable to cases of this sort that the costs should follow the event." Costs.

CASE IV.

BOROUGH OF WATERFORD.

BEFORE RT. HON. MR. BARON HUGHES, APRIL 21, 1870.

Petitioners: Messrs. Condon and O'Shea.

Respondent: Mr. R. Bernal Osborne.

Counsel for Petitioners: Mr. Ryan, Q.C.; Mr. Monahan.

Agent: Mr. Coll.

Counsel for Respondent: Mr. Sergeant Armstrong, ; Mr. Hackett.

Agent: Mr. Edmund Power.

THE petition contained the usual allegations of bribery, &c., but did not pray the seat.

The charges of undue influence by landlords, by employers, and by persons in authority, of spiritual intimidation and of treating were all abandoned, and the Petitioners at the end of the case relied only on the charges of colourable payments and corrupt offers said to have been made by agents of the Respondent, but the evidence in support of these charges was held unworthy of belief.

In the course of the case,

Particulars: amendment of, (1) 194.

Upon the name of one Sherlock being mentioned, it was objected that his name was not in the particulars.

Mr. *Monahan*:—"We will ask to be allowed to add his name, if necessary."

Serjeant *Armstrong*:—"The practice is, for the attorney to be sworn before a name can be added."

Mr. Baron HUGHES :—"It cannot be done as a matter of course, but, on the other hand, I will not shut out any evidence that could be given, unless I see clearly that it would be taking some unfair advantage of the opposite party. What we did on the last trial here was this : when a name was mentioned as an important name, which was not in the particulars, notice was required to be served for the next morning to amend in respect of that particular name, and then inquiry was made, on the oath of the attorney as to when he heard the name first."

Offer of seat in town council a bribe under Corrupt Practices Act 1854, s. 2 (2). 72.

Evidence was tendered to shew that one Dr. Scott had offered to vacate his seat in the Town Council in favour of one Clampett, if Clampett would vote for the Respondent.

It was contended on behalf of the Respondent, that the office of town councillor was not an office within the meaning of the Corrupt Practices Prevention Act 1854, s. 2 (2).

72.

Mr. Baron HUGHES, in his judgment, said as to this :—"On the law of the case it appears to me, as at present advised, that the office of town councillor is an office within the terms and the spirit of the Act. I think it is just such an office as could be abused in the way contemplated by the Act. It is an office of honour and dignity, and the natural and fair object of the reasonable ambition of many electors. If I had a doubt on the subject, and it became necessary to decide it, I would reserve it for the Court of Common Pleas; but I have no doubt."

Effect of report of judge under Parl. El. Act 1868, s. 45. 43.

In the report of the judge as to the previous election, dated February 2, 1870, one Clampett was reported as having been guilty of corrupt practices.

Mr. Baron HUGHES, in his judgment, said as to this :—"What is the effect of the report of Clampett for corrupt practices? It is a judgment of guilt against him for a misdemeanour, just as if he had been tried at the Assizes and found guilty of larceny; it is a civil disqualification of him for any office or public employment, and it even deprives him of his franchise as an elector." *

* But see Bewdley Case, vol. i. 176, where Blackburn, J., held the reverse of this. See also Report from the Select Committee on Corrupt Practices, ordered by House of Commons to be printed, June 23, 1870.

At the close of the Respondent's case,

Evidence may be tendered up to the latest moment of the hearing. (2) 355.

Mr. Baron HUGHES said as follows:—"If any document is required to be produced on either side, or if either side ask that a witness should be examined in order to throw further light upon these matters, I shall be quite ready to receive the evidence up to the last moment I leave the town. We only close the evidence now in form; but up to the last moment I shall be ready to hear anything; I will shut out nothing."

Mr. Baron HUGHES, in his judgment, declared the Respondent duly elected.

As to the principles upon which evidence should be tested, he said:—

How truth of evidence should be tested. 12.

"I fully admit and thoroughly adopt the propositions stated by Mr. Monahan in his reply, viz., that this Court ought not to expect the disclosure of corrupt transactions by pure and untainted witnesses; and further, that this Court is not to discredit one corrupt witness simply because he is contradicted by another corrupt witness. The Judge must look to the probabilities of the case, and must decide which is most likely to be telling the truth, having regard to the known character, the present and future interests of the witnesses, and the manner in which they give their evidence in Court."

As to costs he said:—

Costs.

"Costs follow the event."

CASE V.

BOROUGH OF BRISTOL.

BEFORE MR. BARON BRAMWELL, MAY 23, 1870.

Petitioners: Messrs. Brett and others.

Respondent: Mr. E. S. Robinson.

Counsel for Petitioners: Mr. O'Malley, Q.C.; Mr. Serjeant Sleigh; Mr. Woodforde Ffookes.

Agent: Mr. P. Gilbert.

Counsel for Respondent: Mr. Serjeant Ballantine; Mr. J. O. Griffits; Hon. E. Chandos Leigh.

Agents: Messrs. Gwyn and Westhorpe.

THE petition contained the usual allegations of bribery, &c., and also an allegation of bribery at a preliminary test ballot.

The evidence adduced in support of the charge of bribery and treating was insufficient to establish a case, but it was proved that corrupt treating had taken place at the test ballot; and upon the point being reserved for the Court of Common Pleas to say whether such treating ought to invalidate the election, the Court decided that it ought, and the election was consequently held void.

Before the commencement of the case,

Application at the trial for further particulars not granted, but adjournment

Mr. Serjeant *Ballantine*, for the Respondent, complained that the order for particulars had been most insufficiently complied with, and, unless sufficient information was given by Petitioner's counsel in his opening, so as to enable him to meet the charges

if necessary, promised. (2) 1.

raised against the Respondent, he asked for an adjournment in order to enable inquiries to be made. He further asked that all evidence might be excluded, except such evidence as might be applicable to particulars properly given.

Mr. *O'Malley*, in opening the case for the Petitioners, gave no names of either bribers or bribees.

Mr. Serjeant *Ballantine* therefore repeated his complaint as to the insufficiency of the particulars delivered, and asked his Lordship, before hearing any evidence, to order particulars to be given forthwith of those cases of bribery and treating which the Petitioners were about to prove.

Mr. *O'Malley* protested against any further order for particulars being made.

Mr. Baron BRAMWELL said he did not think he could now make any further order, inasmuch as a list of bribees had already been furnished. Whether, if the application had been made *de novo*, he should have ordered a more specific list, was another matter. However, if any detriment should be done to the Respondent by more particular particulars not having been supplied in the first instance, a remedy would have to be found for it in an adjournment, and in the imposition of costs upon the other side if the adjournment was necessitated by their omission to furnish full particulars.

In the course of the case,

Evidence how far admissible, if name not in particulars. (2) 317.

It was objected that the name of a person alleged to have been bribed was not in the particulars delivered.

Mr. Baron BRAMWELL :—"I do not like to shut out any evidence. It is not in accordance with the order, but I shall not disallow it, because as there is no jury, I should prefer to hear the evidence; and if I see any improper prejudice towards the Respondent, I shall know how to deal with it."

Afterwards he added as to this :—

(2) 339.

"If I come to the conclusion that the suppression of the name has been wilful, I shall know what value to put upon the rest of the evidence given as to this matter; and if I find that any injury has been sustained by the Respondent, I must endeavour to make amends to him in some way or other, by giving him every oppor-

tunity of making inquiry into the case; but, as at present advised, I am resolved to admit the evidence."

Upon a case of bribery being gone into before the agency of the briber had been proved,

When bribery may be gone into before agency proved. (3) 3.

Mr. Baron BRAMWELL said:—"I certainly deprecate proofs of acts done by a person whom there would be little hope of proving to be an agent; because, although the Judge, in his capacity as juryman, might endeavour to weed it out of his mind, a small portion of prejudice may remain; and although the statute* says that you may, unless the Judge otherwise orders, prove bribery before agency, it is desirable that the proof should not be given unless there is a reasonable expectation of proving the agency afterwards."

Mr. Baron BRAMWELL, in his judgment, postponed granting his certificate, and reserved the question of costs until the Court of Common Pleas† had decided the point reserved by him as to treating at the test ballot.

As to reserving a point of law under s. 12 of the Parliamentary Elections Act 1868, he said:—

Point of law how to be reserved.

"The 12th section says, 'If it shall appear to the Judge at the trial of the petition that any question of law requires the further consideration of the Court of Common Pleas (and it does so appear to me in this case), then it shall be lawful for the said Judge . . . to reserve any such question or questions in like manner as questions are usually reserved by a Judge at Nisi Prius.' We all know how that is done. The verdict is for the one party or the other, and then the party against whom the verdict is directed moves to set it aside and get a verdict for himself. Another way, in which questions are reserved, is to make a special case of them; but in substance there ought to be no difficulty; and if the learned counsel will agree upon any way in which it should be done, I will do it in that way, unless I see any reason against it."

Mr. *O'Malley*:—"The best way will be for your Lordship to state a special case upon which we could go to the Court."

* Parliamentary Elections Act 1868, s. 17.

† The Court decided the election to be void.

Mr. Serjeant *Ballantine*:—"Your Lordship will allow us to see you at Chambers before the case is finally settled, so that if any matter occurred to either of us we might make a suggestion."

Mr. Baron BRAMWELL:—"Yes." *

* The case as stated for the opinion of the Court of Common Pleas, together with a full report of the arguments of counsel and the judgment of the Court, is to be found in *Brett* v. *Robinson*, L. R. 5 C. P. 503.

CASE VI.

COUNTY OF TIPPERARY.

BEFORE MR. BARON HUGHES, MAY 27, 1870.

Petitioners: Messrs. Mackay and O'Connor.

Respondent: Mr. Heron, Q.C.

Counsel for Petitioners: Mr. Purcell, Q.C.; Mr. Porter.

Agent: Mr. John Joseph Hickie.

Counsel for Respondent: Mr. Serjeant Armstrong; Mr. Crean.

Agent: Mr. James Kilkelly.

THE petition alleged bribery, treating, undue influence, and interruption of telegrams, both by the Respondent himself, and by his agents. It contained also allegations with regard to the disqualification and personation of voters.

At the hearing all the charges were abandoned, except those of bribery and undue influence by agents, and the evidence as to these was held insufficient to establish a case.

Mr. Baron HUGHES, in his judgment, declared the Respondent duly elected.

As to the influence of Roman Catholic priests, he said:—

Clergy, legitimate influence of. 28.

"A priest's true influence ought to be like a landlord's true influence, springing from the same sources, mutual respect and regard, sympathy for troubles or losses, sound advice, generous assistance, and kind remonstrance. And where these exist, a priest can exercise his just influence without denunciation, and the landlord can use his just influence without threat or violence. A

priest is entitled, as well as any other subject, to have his political opinions, and to exercise his legitimate influence legitimately. It is a mistake to suppose that on a man taking holy orders he ceases to be a citizen, or ceases to be clothed with all the privileges and rights of a citizen. But a priest has no privilege to violate or abuse the law; he has no right to interfere with the rights and privileges of other subjects. He may exercise his own privileges, but he must forbear in respect of others. It is also a mistake to suppose that every act of a priest is a spiritual act; an assault by a priest is simply an assault, and not priestly intimidation; and the assault of a priest can and ought to be resented and prosecuted and punished like any other individual."

Costs followed the event.

CASE VII.

BOROUGH OF BRECON.

BEFORE MR. JUSTICE BYLES, SEPT. 14, 1870.

Petitioners: Messrs. Overton and Mainwaring.

Respondent: Mr. Gwyn Holford.

The Petitioners appeared in person.

Agents: Messrs. Wyatt and Hoskins.

Counsel for Respondent: Mr. Browne.

Agents: Messrs. Carlisle and Ordell.

THE petition contained the usual allegations of bribery, &c., but did not pray the seat.

Before the hearing of the petition, an application for leave to withdraw had been made, but as it was not made in time, the case proceeded in the usual way. At the hearing no evidence was offered, and consequently the petition was dismissed, and the Respondent declared duly elected.

After the Court had been opened,

Procedure in case of irregular application to withdraw petition. (1) 2.

One of the Petitioners, Overton, stated that he had given instructions to withdraw the petition, and he understood that it had been withdrawn, and that he was not now prepared to offer any evidence.

In corroboration of his statement he tendered affidavits which he and the other Petitioner and their Parliamentary Agent had

made on the previous day in the usual form under the Act* as to the reasons for the withdrawal of the petition.

Mr. Justice BYLES :—" I should prefer that the evidence given here should be given *viva voce*, and subject to cross-examination. Therefore I think it better, if you do not object, that you and the other Petitioner should be sworn. Then your affidavit will be read as part of the case, and the adverse counsel may ask you any questions he thinks fit."

Messrs. Overton and Mainwaring were then sworn, and their affidavits read.

(1) 30. Mr. Justice BYLES :—" There must be five clear days after notice for any one to come in that thinks fit, the Petitioner being a trustee for the whole body of voters for the borough and for the public generally, and he cannot withdraw unless he complies with the provisions of the Statute,† which in this case, without any corrupt intention but by an oversight, he has omitted to do. I take this opportunity of saying in the first instance that I have not adopted the course of coming down here without having recourse to judges whose experience in election matters is much greater than mine, and their opinion coincided with mine that this arrangement cannot take place except in open Court, and subject to cross-examination."

The petition was then declared dismissed.

Mr. Justice BYLES, in his judgment,‡ declared the Respondent duly elected. After stating that the petition had been already dismissed, he said that there still remained two questions to be disposed of, one with respect to costs, and the other as to the report he should make to the Speaker.

Costs. As to the question of costs, he said,

(2) 3. " The usual rule is that costs should abide the event, and the precise question now is whether there be anything before the Court to induce it to engraft in this case an exception upon that general rule. Now, no doubt a suspicion might have arisen,

* Parl. El. Act, 1868, Rule XLV.

† Parl. El. Act, 1868, s. 35, and Rules XLV.—XLIX.

‡ This judgment was delivered on the morning after the petition had been heard and dismissed.

since by somebody, and *primâ facie* no doubt by the Petitioner, (whether or not with the connivance of the Respondent), a very irregular course has been taken with respect to the withdrawal of this petition. The Act* of Parliament is clear that when a man has once become a Petitioner he cannot withdraw from the petition until he has given several days' notice of withdrawal, so that another person may, if he thinks fit, come in and stand in his place. The Act says, 'An election petition shall not be withdrawn without the leave of the Court or a judge,' and an indispensable prerequisite then is to apply for the leave of the judge. But a Petitioner cannot even apply for the leave of a judge until he has given the regular notices prescribed by the Act. Now, in this case all these prerequisites have been neglected, and even the notice which *was* published states that which is not correct, for it states that 'the above Petitioners have on the 10th day of September, 1870, lodged at the Master's office notice of an application to withdraw the petition.' Now, as a fact, no such notice was lodged, but I do not think this mis-statement is anything more than a mistake. Upon the whole, after taking a great deal of time to deliberate upon the matter, I owe it to the parties to say that the suspicions which undoubtedly were raised in my mind by all these irregularities have been removed, and I have come to the conclusion that neither were the Petitioners induced by any corrupt motive to commit the irregularities which they undoubtedly did commit, nor that the Respondent had any corrupt intention; but it seems to have been a misreading of the Act of Parliament, a mistake or accident such as may possibly have arisen even in former cases. That being so, I see no sufficient reason why the costs should not abide the event as usual; I therefore order the Petitioners to pay the costs of this inquiry."

* Parl. El. Act, s. 35, and Rule XLIX.

CASE VIII.

BOROUGH OF SHREWSBURY.

BEFORE MR. BARON CHANNELL, DEC. 5, 1870.

Petitioners: Messrs. Buttress and others.

Respondent: Mr. Douglas Straight.

Counsel for Petitioners: Mr. Serjeant Ballantine; Hon. E. Chandos Leigh.

Agents: Messrs. Wyatt and Hoskins.

Counsel for Respondent:
Mr. H. Giffard, Q.C.; Mr. Poland; Mr. Montague Williams.

Agent: Mr. F. C. Greenfield.

THE petition contained the usual allegations of bribery, undue influence, and intimidation, but did not pray the seat.

The evidence that was given in support of the petition failed to establish a case.

Mr. Baron CHANNELL, in his judgment, declared the Respondent duly elected.

On the question of what will constitute agency, he said:—

How far canvassing constitutes agency. 14.

"I do not apprehend that agency is established by merely shewing that a particular person has gone about with a candidate and has canvassed. Canvassing will only afford premises from which a judge, discharging the functions of a jury, may conclude that agency is established. If a gentleman comes down to canvass a borough, and, as a kind of guarantee for his respectability, is introduced to the voters by persons of station and

position in the borough, I am of opinion that such canvassing, though it would be properly called canvassing, would not be canvassing within the meaning of those words from which I am to infer the agency existed. I draw in my own mind the widest distinction between the kind of canvassing in the presence of the candidate and canvassing of such a character as to constitute agency. There may be a central committee, and a gentleman may be chairman of that committee; placards may be issued in the course of the election, signed, not by the candidate himself, but by some person representing him—these are acts which go beyond the mere act of canvassing, if by that you mean that the sitting member is attended on his first introduction by individuals who think he is a fit person to represent the constituency, and introduce him accordingly. I wish it to be understood how far, in my opinion, from mere canvassing those acts must be, from which you may infer that kind of agency which is to fix the candidate with responsibility for the act of the person acting on his behalf."

As to avoiding an election on account of a single and insignificant act of bribery, he said:—

Effect on election of single act of bribery. 23.

"If an act of bribery is clearly made out, and agency is clearly proved, I am disposed to agree with the dictum of my brother WILLES,* even supposing it to be a little in opposition to that of my brother MARTIN,† and to think that a judge is not at liberty to weigh the importance of that act, or to take into consideration the effect it may have had upon the election, but he is bound to apply the express provisions of the Act of Parliament, without going into the question of the comparative insignificance of the act of bribery which has been proved to have been committed."

Costs followed the event. Costs.

* Blackburn case, vol. i. 202. See also Blackburn, J., in Hastings case, vol. i. 218.

† Salford case, vol. i. 142.

CASE IX.

BOROUGH OF NORWICH.

BEFORE MR. JUSTICE KEATING, JAN. 4, 1871.

Petitioner: Mr. Stevens.

Respondent: Mr. Jacob Tillett.

Counsel for Petitioner: Mr. O'Malley, Q.C.; Mr. J. O. Griffiths.

Agents: Messrs. White, Renards and Floyd.

Counsel for Respondent:
Mr. Rodwell, Q.C.; Mr. Serjeant Ballantine; Mr. Sims Reeve.

Agents: Messrs. Flux and Leadbitter.

THE petition contained the usual allegations of bribery, &c., an allegation that the Respondent personally engaged as an agent at his election in 1870 a person who had been scheduled as a briber under the Royal Commission which issued in 1869, and also, an allegation that the Respondent had been guilty of bribery and treating by himself and his agents at the election in 1868.*

* A rule was obtained in the Court of Common Pleas to show cause why this allegation should not be struck out, on the ground that the matters alleged might have been given in evidence in support of the recriminatory case in the previous petition, in which the present Respondent was Petitioner, and claimed the seat. See Norwich case, vol. i. 8. This rule, after an elaborate argument, was discharged, and the allegation accordingly retained. Stevens v. Tillett, L.R. 6, C.P. 147.

It was proved that at the previous election in 1868, the Respondent and the other Liberal candidate, Sir William Russell, coalesced; that one Ray, an agent of Sir W. Russell, bribed several voters to vote for both the Liberal candidates. In consequence of the coalition, the Respondent became liable for the acts of Sir W. Russell's agents, and his subsequent election in 1870 was accordingly held void.

Evidence was given to prove that the Respondent had personally employed as an agent a scheduled briber, contrary to the provisions of Parliamentary Election Act, 1868, s. 44, but it was not sufficient to establish a case. Evidence was also given to show that persons had been bribed to hold up their hands at the nomination; but this was not proved either.

In the course of the case,

Liability of candidates after coalition for the acts of each other's agents.

It was proved that at the election in 1868, the Respondent and the other Liberal candidate, Sir W. Russell, coalesced, that after this coalition, Ray, an agent of Sir W. Russell, instructed one Lacy to bribe several voters to vote for the two Liberal candidates, which he accordingly did.

53. Mr. Justice KEATING said as to this in his judgment,—"The position in which the Respondent was placed in relation to Ray and the other agents of Sir W. Russell by the coalition is so well expressed by my brother Blackburn in the North Norfolk case,* that I would prefer reading his words to using my own."

Having read the passage, he continued as follows:—"It was suggested by Mr. Rodwell for the Respondent, that if it should appear that Ray did not bribe for the Respondent, but exclusively in the interest of Sir W. Russell and against the interest of the Respondent, then in giving a bribe he could not be considered as the agent of the Respondent; in other words, that the joint agency would then, *ipso facto*, terminate. I think if it were clearly established that Ray had gone to a voter and, wishing to exclude the Respondent, had said,—'I give you this bribe to vote for Sir W. Russell, but not to vote for Tillett, because my object is that you should not vote for Tillett,'—it

* Vol. i., 240.

might be successfully argued that he was thereby determining the joint agency, and no longer acting in the bribery as the Respondent's agent. But that has not been proved."

Employment of a scheduled briber as agent. Parl. El. Act, 1868, s. 44.

18.

In support of the charge of employing as an agent a scheduled briber, it was proved that one Ray was scheduled as a briber by the Royal Commissioners appointed in 1869 to inquire into corrupt practices in the borough. The Respondent became a candidate for the borough in June, 1870, and on June 16 he wrote to his agent prohibiting the employment of Ray as an agent. It appears that about that time there were proceedings in Parliament for the purpose of disfranchising the persons scheduled by the Royal Commissioners, and an Act of Parliament, 33 & 34 Vict. c. 25, for that purpose received the Royal Assent on July 4, 1870; but by s. 2 of that Act, an exception is made in favour of Ray and another person until they shall have been adjudged guilty of bribery by a competent tribunal. Shortly after June 16 it became known to the Respondent that Ray was to be thus exempted from the operation of the Act, and on June 25 the Respondent wrote an article in a local paper, of which he was himself the editor, headed, "Tardy Justice to Mr. Ray," which, after alluding to the fact of his exemption under this Act, concluded thus:—"We congratulate Mr. Ray upon the fresh opportunities now accorded to him to serve his party with all his former zeal, and without either risk or reproach." Thereupon Ray commenced active exertions with reference to the election, and though he did not actually canvass, yet he publicly and ostentatiously exerted himself in favour of the Respondent. The Respondent, however, when called as a witness, stated that he had not in any way authorised Ray to make these exertions on his behalf, that he had no knowledge whatever that they were being made, and that he never intended to recognize him in any way as his agent.

Mr. Justice KEATING in his judgment said as to this,—"The 44th section of the Act requires, in order to avoid an election, that the candidate should be proved to have personally engaged the party as canvasser or agent, and I quite agree with the construction which was put upon that section by Mr. Justice

Blackburn in the North Norfolk case.* I quite agree that although it is not required that the candidate should have personally engaged the scheduled man in the sense there referred to, yet he must be proved to have been personally cognizant of, and to have sanctioned his appointment or his acting as his agent, in order to bring him within this section. Undoubtedly in this case there is strong evidence to show that the Respondent, if he had knowledge of the acts of Ray, sanctioned those acts. It appears that Ray's proceedings were public and ostentatious; he published a placard in which he referred persons who were engaged in registration matters to the Respondent's committee-room. I do not find it proved that there was any public repudiation of that on the part of the Respondent, therefore there no doubt are circumstances in this case to bring the Respondent within the construction of the rule which I have mentioned, were it not that the Respondent himself was called, and swore that he had no knowledge whatever of the efforts made by Ray on his behalf, and that he never intended to recognize him as his agent."

Mr. Justice KEATING in his judgment declared the election void on the ground of bribery by agents.

As to an election being avoided by a single act of bribery, he said :— Effect of a single act of bribery upon the election. 51.

"It seems hard at first sight that a single act of bribery should avoid an election; but when an act of bribery is committed the whole election of the party bribing is tainted. It is no longer an election; it is utterly void. On this point I would refer to the learned judgment of my brother Willes in the Blackburn case.† This result may be undoubtedly a cruel consequence of the law of agency as applicable to elections; it is, however, a law that arises from the necessity of the case, and is well put by a learned Scotch judge, Lord Barcaple, in the Greenock case,‡ an exposition which was approved by my brother Blackburn afterwards."§

* Vol. i., 238. † Vol. i., 201, 202. ‡ Vol. i., 251.
§ In the North Norfolk case, vol. i., 240.

Effect of bribing persons to hold up their hands at the nomination. 35.

As to bribing men to hold up their hands at the nomination, he said:—

"If it were proved that a candidate or his agent hired men to attend the nomination, and to hold up their hands upon the occasion, my impression decidedly is that it would be illegal, and would avoid the election. If that had been proved before me, the point being a new one, I should have thought it my duty to reserve that question for the opinion of the Court of Common Pleas."

Costs. 78.

As to costs he said:—

"Generally speaking no doubt the rule prevails that costs should follow the event, but in this case I am not at all satisfied with the particulars delivered; they are most unnecessarily voluminous * and calculated undoubtedly to increase expense. There are also circumstances connected with this case that, in my opinion, bring it very closely and clearly within the Stafford case.† In that case, my brother Blackburn was placed nearly in the position in which I am in now. He felt himself compelled to unseat Mr. Pochin, a gentleman who had gone down to a corrupt borough with the intention, if he possibly could, to cleanse it, but who in the attempt to accomplish that laudable object not only failed, but by an imprudent act of an agent, became liable for that act, but my brother Blackburn, while he felt himself under the necessity of unseating Mr. Pochin, looked to all the circumstances of the case; he looked to the feeling that was exhibited and to the purity which had governed the intentions of Mr. Pochin in that case. The present case bears so strong an analogy to that case, that I do not think that I could satisfactorily distinguish between them, so as to make any other order than that made by Mr. Justice Blackburn upon that occasion. I shall therefore direct that each party pay their own costs.

* See per Blackburn, J., in the Hereford case, vol. i., 196.

† Vol. i., 234.

CASE X.

BOROUGH OF BRECON.

BEFORE MR. JUSTICE LUSH, MAY 8, 1871.

Petitioners: Richard Watkins and J. Watkins.

Respondent: Mr. James Price Gwyn Holford.

Counsel for Petitioners: Mr. Serjeant Ballantine ; Hon. E. Chandos Leigh.

Agents: Messrs. Wyatt and Hoskins.

Counsel for Respondents: Mr. Giffard, Q.C. ; Mr. Montagu Williams.

Agents: Messrs. Carlyle and Ordell.

THE petition alleged that the Respondent was by himself and other persons on his behalf guilty of bribery, treating and undue influence *after* the said election, and for a sixth allegation "that after the said election and return, and within 28 days before the presentation of this petition the Respondent by himself and by others, with his privity and on his account, corruptly gave and provided in pursuance of such corrupt practices meat, drink, entertainment, and provision on Friday, September 30, 1870, at Bickland, in the county of Brecon, to certain voters on account of such voters having voted for him."

It was proved that after the dismissal of a petition which had been presented against the return of the Respondent, an entertainment was given by the mother of the Respondent, but with his knowledge and concurrence, to a large number of persons, among whom were many who had voted for the Respondent at his election, and some of whom had voted against him. It was

not, however, proved that this entertainment had been mentioned or ever thought of till after the election was over, neither was it proved that any such entertainment had ever been given before, or that it was intended thereby to influence the voters at a future election.

Mr. Justice LUSH, in his judgment, declared the Respondent duly elected, and said as follows :—

What is corrupt treating after an election.

"The question which I have to determine is whether the entertainment given by Mrs. Gwyn Holford on September 30, undoubtedly with the knowledge and concurrence of the sitting member, to a large number of persons, amongst whom were many who had voted for the Respondent at the last election, and none of whom had voted against him, was such a treating as avoided the election. This is, I believe, the first case which has arisen of a petition founded upon treating after an election. The Durham case,* relied on by my brother Ballantine, turned upon 5 & 6 Vict. c. 102, s. 22, and the facts brought it within the very words as well as the obvious intention of that Act, but the case does not touch the point now in question. Having, therefore, no authority to guide me, I have to ascertain for myself what is the kind of treating which the Legislature meant to prohibit by the latter part of s. 4 of 17 & 18 Vict. c. 102.

"It is clear, and indeed has been more than once decided,† that the word 'corruptly' governs the whole section, so that what the Act contemplates and makes so penal is, not treating simply and without regard to its character and object, but corrupt treating, that is, treating with a bad motive, treating with an object and purpose which the law denounces and desires to put down.

"In what, then, does corrupt treating given after the election consist? It is easy enough to state what would be corrupt treating before the election. Indeed, the Act itself defines it; but what is that ingredient which must enter into the treating in order to make it corrupt with reference to an election which is over and past, when it can no longer influence the voting or have any effect upon the election?

* 2 P. R. & D. 270.

† Per Blackburn, J., vol. i., 19, 73, 242; and O'Brien, J., vol. i., 265.

"I do not agree with my brother Ballantine that treating with a view to attach the voters to the candidate and secure their future support is within this branch of the section. Treating for such a purpose may peril the future election which it is designed to influence, but we are now dealing with a past election, and the treating charged is therefore a proceeding which reflects back and taints that bygone election. Nor can it be the merely giving an entertainment as an expression of gratitude, or by way of rewarding the voters. So to hold would be to give no meaning to the word 'corruptly,' for the Act says that the offence shall consist, not in the mere giving meat, drink, &c., to a voter 'on account of his having voted,' but the doing so corruptly on account of his having voted. And this agrees with the 5 & 6 Vict. c. 102, s. 22, which was repealed by the Corrupt Practices Act, 1854, the language of which was, not rewarding merely, but *corruptly* rewarding such person for having voted.

"I am, therefore, driven to the conclusion that the treating which the Act calls corrupt as regards a bygone election must be connected with something which preceded the election, must be the complement of something done or existing before and calculated to influence the voter while the vote was in his power. An invitation given before to an entertainment to take place afterwards, or even a promise to invite, or a practice of giving entertainments after an election, which it may be supposed the voters would calculate on, would, if followed up by the treat afterwards, give to it the character of corrupt treating. But when the entertainment was, as it is proved in this case to have been, not only not mentioned, but not even thought of till after the election was over, no such entertainment ever having been given before, it cannot in my judgment be deemed corrupt treating within the meaning of the Act, if even its object was, as my brother Ballantine contends, to gain a hold upon the voters and secure their future support."

The petition must be dismissed with costs. Costs.

CASE XI.

COUNTY OF GALWAY.

BEFORE RT. HON. MR. JUSTICE KEOGH, APRIL 1, 1872.

Petitioner: Captain Trench.

Respondent: Captain Nolan.

Counsel for Petitioner: Mr. Serjeant Armstrong; Mr. Murphy, Q.C.; Mr. Persse.

Agent: Mr. James B. Concannon.

Counsel for Respondent: Mr. MacDonough, Q.C.; Mr. MacDermot.

Agent: Mr. Thomas Higgins.

THE petition* contained the usual allegations of treating and intimidation, and alleged further as follows:—

16. "That by reason of the wrongful acts of the Respondent and his agents aforesaid, and by reason of each of them, the Respondent was disqualified and incapacitated from being elected as a representative for the said County of Galway, and his election and return was illegal and void."

18. "Your Petitioner did, on Feb. 3, 1872, being the day of nomination, cause a notice to be posted in the vicinity of the place of nomination for the said County, and to be advertised in several of the newspapers published in the said County, and to be extensively posted throughout all parts of the said County, which notice was in the words and figures following:—

COUNTY GALWAY ELECTION, 1872.

To the Electors of the County of Galway.

WHEREAS Captain John Philip Nolan, a candidate for the representation for the County of Galway, at an election now

* The whole petition is set out at length in the printed minutes.

about to be held for the said County, has, on divers occasions, by himself, his agents, and other persons on his behalf, been guilty of treating and undue influence in relation to the election aforesaid, in such manner and form as the said offences are defined and described in an Act of Parliament passed in the 18th year of Her present Majesty, and known as, The Corrupt Practices Prevention Act, and in the several statutes now in force relating to the said offences, and whereas, by reason of the said acts of treating and undue influence, and by reason of each and singular of them, the said John Philip Nolan is incapacitated and disqualified from being elected as a Member of Parliament for the said County. Now take notice, that all votes given for the said John Philip Nolan at the said election will be thrown away, and wholly null and void.

(Signed) "JAMES B. CONCANON,
Conducting Agent for Captain the Honourable William Le Poer Trench, a candidate for the representation of the County of Galway at the approaching election."

19. "That on Feb. 6, being the day of polling aforesaid, your petitioner caused a copy of the said notice to be served upon each of the electors before voting for the Respondent or upon a sufficient number of the said electors to have reduced the poll of the Respondent below that of the Petitioner had such electors refrained from voting for the Respondent.

20. "That a large number of duly qualified electors of the said County duly voted for Petitioner at said election."

And the petition concluded by praying that it might be determined that the Petitioner was duly elected, and ought to have been returned, or that the Respondent was not duly elected or returned, and that the election was void.

Evidence was given as to treating in several cases, but in none of them was the charge proved. As to the charge of spiritual intimidation by Roman Catholic priests an enormous amount of evidence was brought forward, the result of which was that it was proved, as Mr. Justice Keogh said, in his judgment,* that

* Page 44 of printed judgment.

there was a "foregone conclusion on the part of the Archbishop, his suffragan bishop, and the greater part, if not the whole, of the parish priests, with regard to whom evidence was tendered, to strain every point, to move every engine, to use every influence to gain their object, and that object I solemnly believe to have been, whether so intended or not, to overthrow all free will and civil liberty in this portion of Ireland."

The allegations in the petition with regard to giving notice of the disqualification of the Respondent were proved, and upon a case stated for the Court of Common Pleas to determine, (1) whether in consequence of the notice that was given "the electors who constituted the majority of the Respondents were fixed with sufficient knowledge of the disqualification of the Respondent, and should have acted upon such disqualification and refrained from voting for the Respondent, and (2) whether the Petitioner, there being no disqualification on his part, was entitled to be declared duly elected," the Court decided, (1) that the electors were fixed with sufficient knowledge, and (2) that the Petitioner was entitled to be declared duly elected.

Before the commencement of the case,

Rules adopted by former election committees, how far now to be followed. 1.

Mr. *MacDonough*, for the Respondent, referred the Court to certain rules* adopted by committees of the House of Commons for the trial of Election Petitions, which provided that counsel for the Petitioner should not go into matters not referred to in the opening statement without special permission from the Committee so to do, and that counsel for the Petitioners shall state full particulars as to their allegations of treating and undue influence.

Mr. Justice KEOGH stated, that although he desired to follow as closely as possible the procedure and practice of the formerly existing Election Committees of the House of Commons, the special reasons (such as distance from the locality and the like) upon which those rules referred were founded, did not apply, now that the trial of Election Petitions were conducted in the localities themselves. He added, that it was to be presumed

* See the preliminary resolutions usually agreed to by Committees set out in 1 P. R. & D. 1.

that counsel for the Petitioner would open their case fully, but without being rigidly tied down to minute details, and that although he would not seek to fetter counsel in their conduct of the case, he would take care that the fullest opportunity should be afforded to the sitting member of meeting any allegations which might be brought forward. He further added, that it did not appear that the Election Committees were in the habit of adopting any resolution with regard to giving the names of persons or places in cases of undue influence. He referred to the report of the Mayo Case, 1857,* which was a case specially of undue influence.

In the course of the case,

Admissibility of evidence of what occurred after the election 3.

In support of the charge of intimidation a witness was asked by Mr. Murphy for the Petitioner:—

Q. Did anything occur to yourself on the night of the polling day?

A. Yes, I was attacked.

Mr. *MacDonough*, for the Respondent, objected to evidence as to anything that took place after the poll was closed, on the ground that there was no averment in the petition of anything connected with the charge of intimidation occurring after the election was over.

Mr. Justice KEOGH:—"I do not know what it is, but it may be evidence. It does not follow that because it is immediately after the election it may not be connected with it for a variety of reasons which will occur to you at once. Besides which the election is not over till the declaration of the poll is made."

Procedure with regard to temporary reception of evidence. 20.

And (later on in the inquiry) upon a witness being asked by Mr. Serjeant Armstrong for the Petitioners, to make a statement about something that occurred a week after the election;

Mr. *MacDonough*, for the Respondent, objected.

Mr. Justice KEOGH:—"Surely it must occur to you at once that if the Petitioners should fix the agency of any particular

* Wolf & D., p. 1. It does not appear that it was ever customary for the Election Committees of the House of Commons to come to any resolution with regard to cases of undue influence.

individual, his declarations afterwards, referring to anything which took place at the election would be the same as the acts of the agent of the Respondent at the election. Independently of that, under this Act of Parliament,* I am charged with a special power, and a special duty, and it may become my duty to make a special report to the House of Commons, and I could call any witness † in the County to tell me anything which occurred which bore upon the state of the County at and previous to that election; so that matters occurring afterwards, and declarations made by parties *may* be most germain to this inquiry. I am not disposed at this stage of the proceedings to shut out this evidence."

Mr. *MacDonough*:—"Where agency has ceased ‡ and the business is over, I submit that no agent has power."

Mr. Justice KEOGH:—"I cannot know that until I hear what it is. You shall not suffer. You are not here now with a jury. I will take care that you are not prejudiced in any way as far as any man can take care, by anything by which you are not ultimately bound. I have power under the Act § to hear all the acts at an election without agency being proved in the first instance."

Mr. *MacDonough*:—"I have perfect confidence that your lordship will not finally deal with anything but legal evidence."

Mr. Justice KEOGH:—"Certainly not. You must ultimately make it evidence, but there is a special Act of Parliament which, in these inquiries, makes a most important alteration in the law, and declares that I shall hear evidence of bribery, treating, and intimidation, or undue influence before agency is proved. It is quite an exception to the Common Law, and is made by statute."

Powers for ordering attendance of witnesses. 18.

Upon two witnesses being called upon their subpœnas and not answering,

Mr. Serjeant *Armstrong*, for the Petitioner, said:—

"My Lord, I am now in a position to say that an attachment will be moved for unless these witnesses appear."

* Parl. El. Act, 1868, § 11 (15). † Ib. § 32.

‡ As to agency ceasing with the close of the poll. See Salford case, vol. i. 136.

§ Parl. El. Act, 1868, § 17. Vide ante, per Bramwell, B., vol. ii. p. 29.

Mr. Justice KEOGH:—"Certainly, and you can state at the same time that very serious powers and of a novel kind are given to me under the statute,* which I shall exercise, and also powers of adjournment† which can be exercised with the view of procuring the attendance of persons. The parties shall have the benefit of all the powers which the Act confers."

Examination of witness as to previous statement in writing. 128.

Upon a witness being asked in support of the charge of intimidation,

Q. Were you [on a certain occasion] in terror of your life?

A. No.

Q. Do you not know that you signed a letter stating that you were?

Mr. *MacDermot*, for the Respondent, objected to the question.

Mr. Serjeant *Armstrong* submitted that this related to the subject matter.

Mr. Justice KEOGH allowed the question to be put, and stated that this inquiry was quite a different inquiry to a suit between parties, and that evidence could be given wholly distinct from matters between the Respondent and the Petitioner. In the Dublin case, documents had been over and over again put into the hands of witnesses with a view of searching their consciences, and confronting them with their own previous statements in writing. ‡

Practice of former election committees followed where no special alteration made. 152.

A witness was asked in support of the charge of spiritual intimidation:—

Q. Did the Rev. Mr. Kemmy make any allusion last Sunday to this petition then pending?

Mr. *MacDonough*, for the Respondent:—"Does not your lordship think that you have ample matter to try without going into this?"

Mr. Justice KEOGH:—"In the Mayo case, 1857,§ I see that the Committee received evidence of what was passing in the

* Vide Parl. El. Act, 1868, s. 32, and Rule XLI. For instances where this power has been exercised, see vol. i. 8, and vol. ii. pp. 3, 12.

† Parl. El. Act, s. 11 (12).

‡ See per Martin, B., in Cheltenham case, vol. i. 63. § Wolf & D., p. 1.

County of Mayo pending the very hearing of the petition. You have yourself more than once referred me to the fact that except where a special alteration is made by Act of Parliament I must be guided as far as can be by the practice of Parliament."

The question was allowed to be put.

Question of admissibility of evidence not to be reserved for Court above. 256.

A witness was asked in examination in chief by Mr. Serjeant *Armstrong*, for the Petitioner:—

"If the tenantry had been left free from alarm and terror do you think that the bulk of them would have voted for the Petitioner?"

Mr. *MacDonough*, for the Respondent, objected to the question on the ground that Committees had resolved not to disturb elections upon the ground of rioting or intimidation of a general character.

Mr. Justice KEOGH stated that similar questions had been permitted to be asked in cross-examination by Counsel for the Respondent, and that if a question was good upon cross-examination there was no reason why it should not be equally good upon direct examination.

Mr. *MacDonough* asked his lordship to reserve the question of the admissibility of the evidence for the Court of Common Pleas.

Mr. Justice KEOGH:—"I do not think I am to be reserving objections to evidence for the Court of Common Pleas."

Employment of scheduled persons, 31 & 32 Vict., c. 125, s. 44. 12.

It appeared that Rev. P. Conway, who had been personally employed by the Respondent as a canvasser, had been reported by the Committee who tried the Mayo petition in 1857 as being "prominently active in the exercise of undue influence and spiritual intimidation."

Mr. Justice KEOGH said, as to this, in his judgment:—

"In this case the 44th section of the Parliamentary Election Act, 1868, creates no statutable disqualification to the Respondent, but if this trial was taking place in the year 1863 instead of 1872, that is within the period of seven years pointed to by that 44th section, the proving of the fact of that report coupled with the personal employment as a canvasser of the Rev. P.

Conway would have disqualified the Respondent for sitting for this county. He is only relieved from the consequence by the solitary fact of the seven years having expired which are fixed by the Act of Parliament.*

Effect of letter written by Respondent in creating agency. 13.

It was proved that the Respondent on November 16, 1871 (that is, about three months † before the election), wrote the following letter to Father Lavelle, who was notorious in the neighbourhood as an active political partizan :—

"My dear Father Lavelle,—

"I have been lately a good deal about the country, and have tried to ascertain the sentiments of the different dioceses with regard to a clerical conference at Athenry. The leading clergymen of Kilmacduagh are all very favourable to the idea. In Clonfert I have seen eight or nine priests, and all approve of it highly. Still there is a difficulty. No priest in Clonfert likes to be the first to ask his fellows. The Very Rev. T. Burke is the natural leader. I have missed seeing him, although I waited two days at Portumna, but I fear that unless some influence is brought to bear upon him he will not lead. I see my way in this respect pretty clearly, but the one link is Father Burke. Two or three Tuam priests might write to Rev. Mr. Shannon and propose a conference. He would certainly agree, and might in turn invite the Galway priests and the three conjointly to the Clonfert clergy. The only practical difficulty I see here is that the invitation would have to be addressed to Father Burke. Still he would hardly refuse the invitation from the three dioceses. The objects for which the conference would meet are solely first to determine how far the clergy should go in asking tenants to vote against their landlords, so that there might be a uniform action upon this point. Secondly, to organise a popular meeting at Athenry. I find the clergy very favourable to these points.

"Sincerely yours,

"J. P. Nolan."

* Vide *dictum* of Blackburn, J., as to this in North Norfolk case, vol. i. 238.

† The election was held on Feb. 6, 1872.

Mr. Justice KEOGH said, in his judgment as to the effect of this letter:—

"If, after the writing of this letter, the Respondent had returned to his military duties, and had never again appeared in the country until after the election was over, he would have been within the authority of the decision in the Blackburn case by Mr. Justice Willes,* and have made every bishop, every priest from the highest to the lowest, who acted at these meetings, so called into existence by the Respondent's own act, his agent for the purposes of this election."

Interference of peers in elections.

48. It was proved that the Marquis of Clanricarde had said to a number of his tenants, "If you can vote for my friend Captain Trench I shall be delighted if you will do so; if you cannot vote for him, at all events stay at home and do not vote against him," or something to that effect. Upon this evidence it was sought on the part of the Respondent to get the marquis reported to the House of Commons under s. 11 (15) of the Parliamentary Elections Act, 1868, as having acted illegally by contravening the resolution† of the House with respect to the interference of peers in elections.

Mr. Justice KEOGH, in his judgment, said as to this:—

"I utterly deny the proposition that any resolution of the House of Commons would make law. The first judges that have ever sat upon the bench have denied it.‡ But I say more,

* Vol. i. p. 200.

† The following is the resolution referred to. Resolved: That it is a high infringement of the liberties and privileges of the Commons of the United Kingdom for any lord of Parliament or other peer, or prelate not being a peer of Ireland at the time elected, and not having declined to serve for any county, city, or borough of Great Britain, to concern himself in the election of members to serve for the Commons in Parliament, except only any peer of Ireland at such elections in Great Britain respectively, where such peer shall appear as a candidate, or by himself or any others be proposed to be elected; or for any lord-lieutenant or governor of any county to avail himself of any authority derived from his commission to influence the election of any member to serve for the Commons in Parliament.

‡ Per Lord Campbell in the House of Lords, June 23, 1853, Hans. 128, 3rd ser., p. 790, and July 5, 1858, Hans. 151, 3rd ser., p. 926. See these *dicta*

namely, that the House of Commons by its resolution never intended to deprive any nobleman, who was also a landlord, of his legitimate influence.* I say it would be a sorry day for this country (and for none more than for the tenant class themselves) if landlords, noblemen, or gentlemen were entirely shut off from the exercise of that legitimate influence which a landlord has a right to use. Over and over again things of this kind have been brought before Parliament. One of the first cases of the violation of that resolution which was brought before Parliament was in the case, I think, of a Bishop of Winchester.† There was another case in the time of the late Earl Fitzhardinge.‡ There were other cases, such as that of the late Duke of Newcastle,§ who went against his own son and turned him out of Parliament, because he was disposed to vote for the repeal of the corn laws. That was a very strong case. The attack was made upon Sir Robert Peel, who was then Prime Minister, and who it was supposed would lean to the charges, because the duke was turning out his son on the ground that he chose to be a supporter of Sir Robert Peel. But Sir Robert Peel said, 'No matter what this nobleman may have done or said against me, I know the principles of the British Constitution, and I will stand by them. God forbid that those resolutions should ever be intended to exclude the legitimate influence of peers.‖ In every single case in which those charges were brought before the House of Commons, the House left the charges where it found them and took the determination of doing nothing.¶ I do not consider that

cited by Wills, Q.C., *arguendo* in Earl Beauchamp *v.* Madresfield, L. R. 8 C. P. 248.

* See speech of Lord Brougham cited in Earl Beauchamp *v.* Madresfield, L. R. 8, C. P. 248.

† It was a Bishop of Worcester. See speech of Mr. Cobbett in the House of Commons, Feb. 19, 1846, on the interference of certain peers in elections; reported in 83 Hansard, 3rd series, p. 1172.

‡ See motion of Mr. Wakley, Dec. 14, 1847, as to this, and debate thereon; reported in 95 Hansard, 3rd series, p. 1067.

§ This was one of the cases as to which Mr. Cobbett moved for an inquiry before the Committee of Privileges, 83 Hansard, 3rd series, p. 1180.

‖ See further remarks of Sir R. Peel to the same effect, 83 Hansard, 1184.

¶ On May 12, 1848, a motion of Mr. W. Page Wood (now Lord Hatherley) for an inquiry by a Select Committee as to a charge of interference by the

Lord Clanricarde has overstepped the bounds of that legitimate influence which he has a right to exercise, or that he has done anything which, unless I was to make him an absolute slave under the terms of the Act, I could prevent his doing. I shall not report Lord Clanricarde as having exceeded either any principle of the common law or any provision of the statute law."

Mr. Justice KEOGH, in his judgment, declared the election void both at common law and under the statute on the ground of undue influence, but reserved the question as to the claim of the seat by the Petitioner for the consideration of the Court of Common Pleas.*

With regard to general corrupt practices, he said :—

As to general corrupt practices.

"My judgment in the Dublin case† has been referred to. In that case I said, 'General bribery or general treating will invalidate an election, even although it be not directly traceable to the candidate, and I say above all things that general intimidation and undue influence, whether it is lay or ecclesiastical, whether it is the ecclesiastic of one persuasion or the ecclesiastic of another, whether it is the Protestant Episcopalian minister or the Roman Catholic priest or the minister of any other of those innumerable sects which I believe are to be found existing all over the face of the world, will upset every election at which it is practised.' I see no reason to qualify in any way a single word which I stated in that judgment. I then believed, and I still believe it to be the law as laid down by the greatest authorities. I see no reason to take any other authority than that which I then made use of,‡ namely, the celebrated argument and the

Marquis of Exeter in the Stamford election was carried by a majority of one; see 98 Hansard, 932. A committee was appointed in consequence, and reported on July 22, 1848, that the charge against the Marquis of Exeter was not proved.

* The Court decided that the Petitioner ought to have been and should be now returned. The case as stated for the opinion of the Court, together with a report of the arguments, and the judgment of the Court, is to be found in Irish Reports (Common Law), vol. vi., p. 464 ; 20 W. R. 833 ; 27 L. T., N. S., 69.

† Vide vol. i., p. 273.

‡ Vide Judgments, p. 344. The case of Huguenin *v.* Baseley, 14 Ves. 288, was also cited by Keogh, J., in his judgment in the Galway Town case, vol. i., p. 305.

magnificent language of Sir Samuel Romilly in *Huguenin* v. *Baseley*, 14 Ves. 288."

Clerical influence, how far legitimate.

As to undue influence as defined by statute, he said:—"What is undue influence? I refer to the 5th section of 17 and 18 Vict. c. 102. It is impossible for any vocabulary of the English language to add one single word to the fulness of that definition. In the Galway town case* I had to consider this Act, and, although I declared that the legitimate influence of the clergy was desirable (and I declare now that the legitimate influence is desirable, that the priests have a right to exercise their legitimate privileges in the same way as other classes), and although I specially denied, in express words, as cogent and concise as I could use, the absurd proposition that no landlord was to use *any* influence with his tenants, and I declared that no steadier, safer, or more legitimate influence than that of the landlord over his tenant could be used, I went on to say that the influence of the clergy must be *legitimately* exercised, and I added these words, that if *unduly exercised* by any of them, the higher the person who used it the more fearlessly he ought to be dealt with. 'I care not,' I said, 'whether he be curate, parish priest, administrator, bishop, or archbishop, I cannot go higher than that in this country, but if undue influence at an election were proved before me to have been exercised within the limits of the law, and if my own reason, consulting as to the proper deductions to be drawn from the facts, I would, without the slightest hesitation in the world, find that to have been an undue election.'† I further declared (and to these words I wish especially to direct the attention of my learned friends) in the Galway town case three years ago, that 'if a single elector, the most miserable freeman that crawls about this town, had been refused the rites of the Churches in order to compel him to vote or because he had voted, or because a member of his family had voted in a particular way, I would have avoided this election without the slightest hesitation,' and I added, 'If the Legislature in its goodwill and pleasure and judgment (the bill was then going through Parliament for the disestablishment of the then Established Church) is minded to strike down what is called one ascendency, I hope

* Vol. i. p. 306. † Vide Judgments, p. 347.

and believe that the intelligence, the spirit, and the independence of the lay Catholics of this country will prevent the setting up of another ascendency over them more galling and fatal through coming from the midst of their own community.' I see no reason to alter or qualify a single word that I said upon that occasion." *

He then cited, with approval, certain passages from the judgments of Mr. Justice Fitzgerald in the Longford case,† and Mr. Baron Fitzgerald in the Limerick case,‡ as to the effect of undue clerical influence.

Point of law, how to be reserved.

As to drawing up the case for the decision of the point of law reserved for the Court of Common Pleas, he said:—

"I shall draw up the case. I have the sole and entire control of it; it is within my dominion as sitting here as judge to try this case by the law of the land. I shall submit that case, giving the counsel on both sides an opportunity to argue it." §

Application made by Respondent to report persons for corrupt practices.

As to reporting persons under s. 11 (14 b.) of the Parliamentary Elections Act, 1868, as guilty of corrupt practices, he said:—

"The only remaining topic is one upon which I never heard a judge addressed before upon the trial of any election petition. It may have been done, but I am not aware of it. The counsel acting on behalf of the Respondent (though in this particular instance they should have been acting more on behalf of public right) ask me to report to the House of Commons that certain persons have been guilty of intimidation against some of the voters being their tenants. Now all the arguments which were addressed to me upon this subject were arguments in which neither of the parties were concerned. I say that I never heard an argument of the kind addressed to a judge before. It is extraneous to the rights of the parties, and it is for the judge, I conceive, himself to see whether there is proper ground for such a report."

Costs.

Costs followed the event.

* Vide Judgments, p. 347.

† The passage is given in ante, p. 16, beginning at the words, "In the proper exercise of that influence," down to end of the paragraph.

‡ The passage is given in vol. i., p. 262, beginning at the words, "If, as it has been admitted," down to the end of the paragraph.

§ But see the observations of Bramwell, B., in the Bristol case, ante, p. 29.

CASE XII.

BOROUGH OF GLOUCESTER.

BEFORE MR. JUSTICE BLACKBURN, JULY 15, 1873.

Petitioners: Sir William Guise, Bart., and others.

Respondent: William Killigrew Wait.

Counsel for Petitioners: Mr. Serjeant Sargood; Hon. Chandos Leigh; Mr. Le Marchant.

Agents: Messrs. Wiltons and Riddeford.

Counsel for Respondent: Mr. Hardinge Giffard, Q.C.; Mr. Norris; Mr. Kydd.

Agents: Messrs. Taynton and Son.

THE petition contained the usual allegations of bribery, treating, undue influence, and corrupt practices, and also alleged fourthly, that, "At the said election certain persons were procured by the Respondent, or by his agents, or by others on his behalf, to personate and falsely assume to vote in the names of certain other persons whose names appear in the register of persons entitled to vote at any election of a member or members to serve in Parliament, which might take place in and for the said borough during the year commencing Jan. 1st, 1873, whereby the Respondent was and is incapable of being elected or sitting in Parliament during the Parliament now in existence, and the said election and return of the Respondent were and are null and void."

And fifthly,—"That at the said election the Respondent by himself, or by his agents, aided, abetted, counselled, or procured

the commission at the said election of the offence of personation by a certain person or certain persons whereby the Respondent was and is incapable of being elected," &c.

The charges of bribery and treating were abandoned. Evidence was given as to several charges of personation, but the evidence in each instance failed to establish a case.

In the course of the case,

Doubtful whether ballot papers used at municipal election may be inspected on the trial of a petition relating to a parliamentary election. (1) 122.

Mr. Serjeant *Sargood*, for the Petitioner, applied to inspect the ballot paper which had been used by a voter at the last municipal election, it having been proved that that voter had voted at the Parliamentary election which was then being questioned.

Mr. Justice BLACKBURN:—"Whether I can at a Parliamentary election open the ballot papers used at the municipal election, is a matter which the Legislature has left in doubt, and I do not want to have to decide it, unless it becomes absolutely necessary." *

Whether certain cards issued by the Respondent's committee were a fraudulent device within the meaning of s. 5 of Corrupt Practices Act.

It was admitted by the Respondent's party that they issued cards to a large number of voters, similar in shape and appearance to ballot papers, and having a mark on them put opposite to the name of the Respondent. It was stated on the cards that if any voter marked his ballot paper otherwise than in the way in which the card was marked, his vote would be invalidated. It was contended on the part of the Petitioners that the issuing of cards like this, was an attempt to obtain votes by a fraudulent

* By rule 64 (*b*) of the Ballot Act it is provided, as to municipal elections, that "all ballot papers and other documents, which in the case of a Parliamentary election are forwarded to the clerk of the Crown, shall be delivered to the town clerk of the municipal borough in which the election is held, and shall be kept by him among the records of the borough; and the provisions of part one of this schedule with respect to the inspection, production, and destruction of such ballot papers and documents, shall apply respectively to the ballot papers and documents so in the custody of the town clerk, with [certain] modifications." Then follow the modifications, one of which is that an order of the County Court judge granting inspection shall be substituted for the order of the House of Commons, or of one of the superior courts.

device, and that it was a contravention of s. 5 of 17 & 18 Vict. c. 102, which enacted that "every person who shall directly or indirectly . . . . by any fraudulent device or contrivance, impede, prevent, or otherwise interfere with the free exercise of the franchise of any voter . . . . shall be deemed to have committed the offence of undue influence," and that consequently the election ought to be declared void.

Mr. Serjeant *Sargood* proposed to supplement what was admitted by calling witnesses to prove what in several instances the effect produced by these cards really was.

Mr. Justice BLACKBURN :—"The real question is, what was the effect likely to be intended to be produced."

Mr. Serjeant *Sargood* upon that intimation from his Lordship, said that he need not call any witnesses.

Mr. Justice BLACKBURN :—"If I come to the conclusion that those who issued the cards intended to trick people into putting no mark for Robinson (the other candidate) for fear that it should invalidate their vote, that I suppose would be a fraudulent device within the meaning of the Act."

Mr. Serjeant *Sargood* : "That is the point, and I believe we have never had it before."

After hearing counsel on both sides as to this point, Mr. (2) 321.
Justice BLACKBURN said as follows :—"I agree with what all the counsel have said on the point of law, that where there is a fraudulent device of any sort to prevent a voter from voting in a certain way, that would come within the intention of the Corrupt Practices Act. Therefore, if I come to the conclusion that these cards were intended to produce the effect that Robinson's voters should vote for the Respondent, I should be inclined to say that the Act had been contravened. Now, though I do not doubt but that there may be voters in Gloucester who are not intelligent enough to understand the meaning of the directions put upon the cards,—and I think, therefore, it would be as well in the future that people should not put any directions upon such cards as these which may possibly mislead—I cannot believe that the committee who issued these cards were speculating upon their being able to mislead the voters in that way so as to have had a fraudulent intention. Therefore, as the intention to mislead

is an essential part of what was done being held to have been fraudulent, this part of the Petitioner's case fails."

Employment of voters to keep order invalidates votes.

It was proved that each party agreed to appoint and pay twenty-four men to keep order at the doors of the various polling stations.

Mr. Justice BLACKBURN said as to this in his judgment:—

214. "I think this was honestly intended, but I am by no means clear that it would not have the effect of making these forty-eight votes bad on a scrutiny, and I am sure it would be much better in future to let the returning officer and the local authority select themselves the proper number of officers to do the work, and not to delegate it to the political parties."

Employment of voters, when colourable.

It was proved that each party having agreed to appoint and pay twenty-four men to keep order at the doors of the various polling stations, the Respondent's party appointed five men too many. These five men being disappointed of being thus employed, assisted the Respondent's party in bringing up voters on the day of the election, and themselves voted. There was no agreement that they were to be paid for the work they did, but on the evening after the election they came to the Respondent's agent and claimed to be paid. The agent thereupon gave them five shillings apiece. He subsequently entered this amount in the vouchers as part of the election expenses, and it was repaid to him by the Respondent. It was submitted by the Petitioners that the payments to these men were merely colourable, and were in fact bribes.

221. Mr. Justice BLACKBURN in his judgment said on this:—

"Certainly the votes of these men would have to be struck off on a scrutiny, but when I am asked to go further, and to say that a thing like this which they do openly in that way with no pretence at concealment, was a cover for intentional bribery, I must say I cannot draw the inference from the facts."

When aiding in personation by agent will invalidate election.

It was proved that the name of George Williams, of Brook Street, was on the register, and that there were two persons of this name living in Brook Street at the time of the election;

but, as one of them had not come to live in Brook Street until it was too late for him to have his name put upon the register, it was clear that he was not the man meant to be upon the register. The right George Williams voted first, and upon the other George Williams applying for a ballot paper at the instigation of an agent of the Respondent named Pickard, he was taken before the magistrates and committed to take his trial for personation. Mr. Pickard stated, upon being called as a witness, that he firmly believed at the time he canvassed Williams that he was the man whose name was on the register. Nevertheless, upon these facts, the counsel for the Petitioners submitted that the Respondent was guilty of personation by his agent Pickard, and that his election must be avoided under s. 24 of the Ballot Act.

Mr. Justice BLACKBURN said as to this in his judgment :— 229.

"As the accused man, George Williams, did not come to live in Brook Street until it was too late for him to be registered, I am quite satisfied that he was not the man meant upon the register, but that the man whose vote has been counted was the man meant. If the accused man was aware of that when he applied for a ballot paper, he was guilty of personation; he may possibly have made a mistake as to what he was about, of that I will say nothing, there will be evidence of this to be considered when he is brought up for trial. But as to Mr. Pickard, after the evidence that he has given, I cannot say that he could have been a party to this personation, because he honestly believed George Williams was the right George Williams, and I need not say it is obvious in point of law that in that case he is not a party to it."

What must be proved in order to establish a case of personation by agent.

It was proved that the name of John Gage, who was the father of George Gage, was on the register. Some months before the election, John Gage went away from the borough, and his son George continued to occupy and pay rent and rates for his father's house. George Gage was under twenty-one, and was not upon the register. Notwithstanding this, one Maslyn, who was said to be an agent of the Respondent, induced him to vote in his father's name. Maslyn, however, when called as a witness, stated that he knew nothing of George Gage's father, that he

did not know George Gage's Christian name, and that he honestly believed at the time that he canvassed him that he was the person whose name was on the register.

236. Mr. Justice BLACKBURN in his judgment said as to this:—"If Maslyn knew that John Gage was the person who was the voter, and not George, and, notwithstanding this, sought to persuade George to go and vote instead of John, he would of course have been guilty of the offence of personating, and if his agency was proved, the seat would be forfeited. But after Maslyn's distinct oath, I cannot come to the conclusion that he is now committing perjury and was then committing felony. I must therefore hold that this case fails."

Mr. Justice BLACKBURN in his judgment declared the Respondent duly elected.

Law as to personation. 224. As to personation, he said,—"There is very little doubt, indeed, as to what the law is upon this subject. With the Ballot Act and secret voting, it becomes a very dangerous offence if any one goes to vote and contrives to get a vote registered in the name of another person when he has no right to vote, for, unless the vote of a personator is objected to, there is no machinery provided for enabling us to examine upon which side that vote was given in order to strike it off. If, however, it is once brought home, and it is shown that a particular man did not vote, but another person personated him, the vote given by that other person becomes invalid, and there is a provision * for inspecting that vote and striking that vote off on a scrutiny. That makes it a very dangerous thing indeed, and therefore the Legislature have been very anxious to prevent it, and they have made a very severe penalty for it,† but I do not say it is a bit too severe to prevent a practice which always must be very fraudulent. They further proceed to say that when this corrupt practice is shown to be committed by an agent of the sitting member, not only will the agent be guilty of a felony, but it shall also vacate the election, and forfeit the seat. Of course this is a very severe penalty on the sitting member, and though in a great many cases I have felt that for a small error

* Ballot Act, Rule 41. † Ballot Act, s. 24.

on the part of the agent, it was rather hard that the sitting member should lose his seat, yet I do think that where he has employed an agent who is capable of doing such a thing as persuading another to fraudulently personate and obtain a vote, knowing he was not entitled to it, he properly enough suffers the penalty of having trusted such a person with the management of his election."

Costs followed the event. Costs.

CASE XIII.

BOROUGH OF TAUNTON.

BEFORE MR. JUSTICE GROVE, JAN. 12, 1874.

Petitioners: John Marshall and Walter Chorley Brannan.

Respondent: Sir Henry James.

Counsel for Petitioners: Mr. Charles Russell, Q.C.; Mr. W. G. Harrison; Mr. A. Collins.

Agents: Messrs. Kimber and Ellis; Mr. Blake.

Counsel for Respondent: Mr. Serjeant Ballantine; Mr. Hardinge Giffard, Q.C.; Mr. J. O. Griffits.

Agents: Messrs. Holmes, Anton, and Co.

THE petition contained the usual allegations of bribery, treating, undue influence, and personation, and general bribery and treating, but did not pray the seat.

The charge of personal bribery was withdrawn before the conclusion of the case.

In support of the charge of general corruption, "painful disclosures were made, applying to a portion of the constituency, small with reference to the whole body, but not absolutely inconsiderable, which showed, by the mere exhibition of the witnesses themselves, that there were a certain number of voters who, for a small bribe or a small supply of drink, would promise their votes to either candidate, and some of whom had reached the lowest stage of degradation, that they gloried in their

shame;" * but it was not proved that extensive bribery or corruption prevailed at the election.

In support of the charge of bribery by agent, evidence was given with regard to a considerable number of cases, but, although it was proved that bribes had been given in several cases, the agency of the briber was in none of them established.

In the course of the case,

Evidence as to what occurred after the election.

Mr. *Harrison*, for the Petitioners, asked a witness:—"Since the petition has been filed, has there been anything noticeable about the streets of Taunton?"

Mr. Serjeant *Ballantine* objected to the question.

Mr. *Harrison*:—"Have you seen a number of persons about the streets of Taunton?"

Witness:—"Yes; I have seen a number of persons, since the petition has been lodged, watching and spying about the streets of Taunton."

Mr. Serjeant *Ballantine* objected to the reception of this evidence, on the ground that there was no presumption of agency with respect to these persons which would affect the sitting member.

Mr. *Giffard* also pointed out that, in the Lynn case,† Martin, B., held that the termination of the election was the termination of agency, and that if it is wished to prove it afterwards, it must be proved by the general law.

Mr. Justice GROVE stated that he understood the Counsel for the Petitioners to ask him to draw the inference that because certain persons had been employed in the interest of the sitting member after the election, therefore those persons had been employed as agents before the election. Unless Mr. Russell could produce a case in which it had been so ruled, he (Mr. Justice Grove) must hold that the two things were legally altogether unconnected.

The question was not further pressed.

* Per Grove, J., in his judgment.

† 1 O. & H. 208. See also Salford case, *ib.* 136; and per Blackburn, J., in the North Norfolk case, ib. 243.

Subsequently,

Mr. *Russell*, for the Petitioners, asked a witness the following question:—"Did you, on Jan. 10 (that is, after the election), meet Mr. Burnam and two other persons together?"

Witness:—"Yes."

Mr. Justice GROVE:—"Now you are getting to what occurred after the election."

Mr. *Russell* submitted that the further questions which he was about to put to this witness stood in a different category. He was proposing to prove that Mr. Burnam, who had been admitted to be an agent, and who, he should by-and-by prove, had continued to act as an agent after the election was over in getting up evidence for the petition, had employed persons to watch one Smith, and to give information against Smith to the witness, who was an Excise Officer.

Mr. Serjeant *Ballantine* objected to the evidence.

Mr. Justice GROVE asked Mr. Russell if he could refer to any authority in support of his right to put the question, remarking that Willes, J., in the Bodmin case,* had expressed himself very strongly upon the subject.

Mr. *Russell* stated that he had examined the cases,† and he thought he was justified in saying that in every one of them the question was whether the alleged acts or the alleged statements could be relied upon as evidence of corrupt practice for the purpose of unseating the member, but he (Mr. Russell) was going to use this evidence for a different purpose. He did not allege that the acts to be spoken to would be corrupt acts so as to unseat the member, but as a strong corroboration of two things—first, of the truth of Smith's story; and secondly, that certain persons had been brought together in concocting this charge against Smith, and giving this information.

Mr. Justice GROVE stated that, though the evidence proposed to be given might possibly show misconduct on the part of Burnam, who was admitted to be an agent, it could not, so far as he could see, go towards corroborating or contradicting Smith.

* 1 O. & H. 118.

† Bridgewater, 1 O. & H. 114; Waterford, 2 O. & H. 3; Longford, *ib.* 12; Galway, *ib.* 49.

Even supposing that the evidence were admissible, he could not see that the conduct of Burnam after the election, when he could be no longer acting as an agent for election purposes, could be evidence collaterally to contradict any other witness.

Mr. *Russell* reminded his lordship that he had stated that he proposed to prove that Burnam had been acting as an agent since the election in getting up the petition.

Mr. Justice GROVE stated that that would be good ground for cross-examining Burnam, and attempting to shake his testimony when he was called, but that did not at present bear upon the issue to be raised.

Mr. *Russell* submitted that at all events he was entitled to show that Burnam and others were acting together in this matter.

Mr. Justice GROVE stated that Mr. Russell had already got out the fact that Burnam and two others were together, and he might, if he pleased, get the further fact that there were two more with them, but he must not go beyond that.

Evidence of what was said to unsuccessful candidate while canvassing.

Sir Alfred Slade (the unsuccessful candidate at the last election) being asked,—

"During your own personal canvass was anything said to you by the voters whom you were canvassing as to money or drink?"

Mr. Serjeant *Ballantine* objected to the witness being asked as to what the voters had said to him.

Mr. *Russell* submitted that the question was pertinent to the issue, whether or not general corruption prevailed in the borough at the last election.

Mr. Justice GROVE stated that evidence as to the conduct of voters would be clearly admissible, and he thought that an application for drink would be evidence of general corruption.

Mr. Serjeant *Ballantine* further objected to the reception of the evidence on the technical ground that the Respondent ought to have had notice in the bill of particulars to the special acts or statements leading to the conclusion of general corruption.

Mr. Justice GROVE: "I do not think the point is free from doubt; but I rule against you, Brother Ballantine. In proving

general corruption, it would be impossible to specify names.* The utmost particulars that they could give you would be of no use to you, because it would be simply that several voters, whose names were unknown, applied to the candidate in the course of his canvass for drink; this would not assist you much. If names are obtainable and are not in the particulars, you may have some ground of objection; but if no names are able to be given, it is admissible as proof of general corruption."

Order for attendance of witness.

Upon a witness being called on his subpœna and not answering,

Mr. *Russell*, for the Petitioners, asked his lordship to give an order to compel his attendance.

Mr. Justice GROVE stated that he could not do so unless it were proved that the witness was intentionally keeping out of the way.

Mr. *Collins* referred the Court to the observations of Baron Martin in the Norwich case† as to a person named Hardiment.

Eventually the witness appeared in court, so that an order became unnecessary.

Admissibility of evidence as to former petition.

Mr. *Russell*, for the Petitioners, proposed to prove what had occurred with regard to a petition presented by the present Respondent as to a former election, and that the names of some of the persons now acting as agents for the Respondent had been inserted in the particulars as to bribery given by the present Respondent as to the former petition.

Mr. Justice GROVE: "I am of opinion that the evidence is inadmissible. Of course it is always a more serious matter for a judge to decide a question where his decision cannot be reviewed; but that is no reason why he should decide against the judgment of his own mind. Let us look at what the evidence comes to. It is in fact asking me to admit as evidence in this case tending to affect my mind that certain persons are likely to be corrupt because their names were given in a list of particulars as to a former petition by the gentleman who is now the Respondent, it being stated in those particulars that those

* See Beverley case, 1 O. & H. 143-145. † 1 O. & H. 9.

persons were guilty of corrupt practices. The decision as to that former petition went upon different grounds from anything I am now inquiring into in this case, namely, upon the payment of revising barrister's money,* and there was no proof that the persons mentioned in the particulars were guilty of the corrupt practices alleged. But even supposing the persons alleged to be corrupt had been proved to be so, I am not aware that in law the fact that a person has been by the verdict of a jury found guilty of corrupt practices, can be used in a subsequent trial between different parties further than this, that the person alleged to have been guilty of corrupt practices, if put into the box, can be cross-examined on the subject. You might just as well, with regard to any witness called, without cross-examining him, prove affirmatively that somebody else had on some previous occasion made a charge against the witness that he had done something wrong. I need not, addressing lawyers, contend or argue that that would be clearly inadmissible, and I cannot see any grounds for holding that this evidence is admissible. There is also another practical objection, that would not be itself perhaps a legal objection, if the evidence was admissible; but I am not sure that it does not amount to a legal objection, and that is, that it is a collateral issue which I should have to try. I should have to try the whole of the circumstances of the former petition, how far the charges were properly made, whether the charges were established, or whether they were shown to be entirely groundless,—I should have to go into all this—before I could proceed to apply that evidence to the present case."

Mr. *Russell*:—"The effect of your lordship's decision would cover the tender of the proceedings in the former petitions."

Mr. Justice GROVE:—"Yes, certainly, unless they are admissible upon any other grounds."

When a point may be reserved.

His lordship then went on to say further as to this matter as follows: "This is not a point that can be reserved for the Court, because a point reserved for the Court must go to the whole trial. A point reserved must be such a point that if the Court decide it against my ruling, it will affect the whole result of the trial. No point can be reserved unless it goes to the whole result."

* See 1 O. & H. 181.

Production of telegrams.

Mr. *Russell*, for the Petitioners, stated that he required to see certain telegrams which had passed from Taunton to other places at certain dates, but that the officials of the Telegraph department were unwilling to produce them, unless required for the purpose of a judicial inquiry. He therefore now asked the Court to give an intimation to that effect.

Mr. Justice GROVE stated that in any case, before the telegrams were examined, there should be something limiting the examination.

Mr. *Russell* stated that that could not be done.

Mr. Justice GROVE said that this was a matter involving a great deal of difficulty on public grounds, and that he desired, before giving his decision upon the point, to have the opinion of the two other election judges upon it. He then inquired what were the telegrams which Mr. Russell proposed to look at.

Mr. *Russell* stated that he proposed to look at any telegrams to and from the persons alleged by the Petitioners to have been acting as agents in the election; and he offered, in order to obviate any inconvenience, to furnish a list of the persons to and from whom the Petitioners alleged telegrams to have passed and which they desired to inspect.

An officer from the Post Office called the attention of the Court to the enactment of 1869, 32 & 33 Vict. c. 73, s. 23: "That nothing in this Act shall have the effect of relieving any officer of the Post Office from any liability which would but for the passing of this Act have attached to a telegraph company or any other company or person to produce in any court of law, when duly required so to do, any such written or printed message." He stated that the subpœna served upon him was for "all telegrams and copies of telegrams sent to and from the town of Taunton from the commencement of September last to the present time." In obedience to that subpœna he had brought with him all the telegrams sent from Taunton during that time, those being all that were in existence.

On a subsequent day,

Mr. Justice GROVE said as follows as to this:—

"I have received an answer from my learned brothers, whom I have consulted with respect to the production of the telegrams,

and they coincide in the opinion which I rather intimated on Saturday, though I did not express a formal decision, that I decidedly ought not to interfere to compel the production of those telegrams, or even to say anything to the Post-Office officers to procure their production. I do not wish to go into reasons for the decision, for this reason, namely, that I am not by this decision saying that cases might not arise where, upon strong specific grounds being shewn, the judge might interpose his authority; but all I say is, that certainly the present is not such a case."

Mr. *Russell*:—"Perhaps your lordship will allow me to say something by-and-by as to these telegrams; at present I will not make any application about them."

Mr. Justice GROVE:—"Do not understand what I have said as inviting an application; but in what I have said I am only desirous of preventing my decision being taken in a wide sense that might trammel other judges. I take it that the witness declines to produce the telegrams of his own authority. That he has already said to me. I do not interfere with the Post-Office authorities if they on any occasion of their own accord choose to do certain acts. That is no business of mine. I do not compel or invite them to produce these telegrams.

Mr. Justice GROVE, in his judgment, declared the Respondent duly elected.

Law of agency discussed.

As to the law of agency, he said as follows:—"The law of agency, as applied to election petitions, has been differently expressed by different learned judges, some of whom have likened it to the relation of master and servant,* and another to the employer of persons to run a race for him;† but no exact definition, meeting all cases, has, as far as I am aware, been given. Two learned judges—the late Mr. Justice Willes and Mr. Justice Blackburn—have pointed out‡ the difficulties of

* Per Martin, B., Norwich case, 1 O. & H. 11, and Westminster case, *ib.* 95.

† Per Willes, J., Westbury case, 1 O. & H. 55; Tamworth, *ib.* 81; Coventry, *ib.* 107; Blackburn case, *ib.* 202.

‡ Per Willes, J., Tamworth, 1 O. & H. 81; per Blackburn, J., Staleybridge, *ib.* 68.

arriving at one. All agree that the relation is not the Common Law one of principal and agent, but that the candidate may be responsible for the acts of one acting on his behalf, though the acts be beyond the scope of the authority given, or, indeed, in violation of express injunction. So far as regards the present case, I am of opinion that, to establish agency for which the candidate would be responsible, he must be proved by himself or by his authorized agent to have employed the persons whose conduct is impugned to act on his behalf, or to have to some extent put himself in their hands, or to have made common cause with them for the purpose of promoting his election. To what extent such relation may be sufficient to fix the candidate must, it seems to me, be a question of degree and of evidence to be judged of by the Election Petition Tribunal. Mere non-interference with persons who, feeling interested in the success of the candidate, may act in support of his canvass, is not sufficient, in my judgment, to saddle the candidate with any unlawful acts of theirs of which the tribunal is satisfied he or his authorized agent is ignorant. It would be vain to attempt an exhaustive definition, and possibly exception may be taken to the approximate limitation which I have endeavoured to express."

As to the nature of tribunal, and of the evidence required to establish a case.

With regard to the nature of the tribunal and of the evidence which should be adduced in order to establish a case, he said: "It must be borne in mind in these cases, that although the object of the statute by which these election tribunals was created* was to prevent corrupt practices, still the tribunal is a judicial, and not an inquisitorial, one;† it is a court to hear and determine according to law, and not a commission armed with powers to inquire into and suppress corruption. To use the language of that eminent judge, the late Mr. Justice Willes, 'No amount of evidence ought to induce a judicial tribunal to act upon mere suspicion or to imagine the existence of evidence which might have been given by the Petitioner, but which he has not thought it to his interest actually to bring forward, and to act upon that evidence and not upon the evidence which really has been brought forward. The second principle, which is more

* 31 & 32 Vict. c. 125.

† Vide ante, vol. i., pp. 6, 48, 227.

particularly applicable to circumstantial evidence, is this, that the circumstances to establish the affirmative of a proposition, where circumstantial evidence is relied upon, must be all, such of them as are believed, circumstances consistent with the affirmative, and that there must be some one or more circumstances believed by the tribunal, if you are dealing with a criminal case, inconsistent with any reasonable theory of innocence, and when you are dealing with a civil case (otherwise expressed, though probably the result is for the most part the same), proving the probability of the affirmative to be so much stronger than that of the negative that a reasonable mind would adopt the affirmative in preference to the negative.'* Baron Martin says:† 'I will not act upon anything as to which there possibly may be a mistake or error; but I think I do right when an election is sought to be impeached, not because of an act done by the candidates themselves, but for an act which they have forbidden, in requiring to be convinced beyond possibility of error that the act relied upon by the Petitioners which is to unseat the members did actually take place. If I am satisfied that the candidates intended honestly to comply with the law, and meant to obey it, and that they themselves did no act contrary to the law, their desire and object being that the proceedings in reference to the election should be pure and honest, I will not unseat such persons upon the supposed act of an agent unless the act is established to my entire satisfaction.' He says in another place:‡ 'I think I am justified, when I am about to apply such a law, in requiring to be satisfied beyond all reasonable doubt that the act of bribery was done, and that unless the proof is strong and cogent—I should say very strong and very cogent—I ought not to affect the seat of an honest and well-intentioned man by the act of a third person. When I come to apply my mind to the evidence, I should require to see, in the first place, that there is agency; in the second place, I should require to be satisfied and certain that there could be no mistake with reference to the alleged act.' Now, without expressing myself in equally strong terms with those used by the learned judge last quoted, I am at all events of

* Tamworth, 1 O. & H. 84. † Wigan, 1 O. & H. 192.
‡ Westminster, 1 O. & H. 96.

opinion that the evidence of corrupt practice must establish affirmatively to the reasonable satisfaction of the judge that the acts complained of were done."

Costs.

As to costs, he said: "Some most unpleasant disclosures were made by witnesses called by the Petitioners as to the mode in which evidence had been collected in an improper way by three men, Phillips, Woolley, and Belham, and though the witnesses were some of them very unreliable, still the charges being broadly made, and no attempt being made to answer or explain them (neither of the three men I have mentioned nor Mr. Blake, the country solicitor, being called or even tendered for cross-examination), the impression left on my mind was a painful one. I have not, however, to try this issue, and the only bearing it can have on this inquiry is on the question of costs. Mr. Ellis, the London agent, appears not to have participated in the proceedings to which I refer. Mr. Blake, the country solicitor, is a very young man, but he is responsible for the conduct of the petition, and taking the whole matter into consideration, I am quite clear that there is, to say the least, nothing to take this case out of the usual rule, that costs follow the event.*

* The learned judge had said in his judgment, after summing up the Petitioner's evidence, that a strong *primâ facie* case had been established; it is possible, therefore, that had it not been for the improper way in which part of the evidence had been collected, his decision as to costs would have been different.

CASE XIV.

BOROUGH OF HACKNEY.

BEFORE MR. JUSTICE GROVE, APRIL 14, 1874.

Petitioner: Mr. Gill.

Respondents: Sir Charles Reed; Mr. Holms.

Counsel for Petitioners: Mr. Patchett.

Agent: Mr. Sawtell.

Counsel for Respondents: Hon. E. Chandos Leigh; Mr. C. Bowen.

Agents: Messrs. Wyatt and Hoskins.

Counsel for Returning Officer: Mr. Barnard.

The petition alleged,—

"That the said election was holden on the 4th day of February, in the year of our Lord 1874, when Charles Reed and John Holms, and your Petitioner William John Gill were candidates, and that the Returning Officer made a return to the writ in the words and figures following, that is to say, 'On receipt of the within writ I gave all the notices required by the statute, and proceeded to the election in due course, according to law. Three candidates having been nominated, I then gave due notice of taking the poll, and appointed nineteen polling places. In consequence of the partial failure of the person who contracted to deliver the requisite ballot boxes, papers, stamps, and other materials, no poll was taken at two of the polling places, and in some others the polling was somewhat delayed. Subject to facts,

I hereby certify that the members elected for the Borough of Hackney in pursuance of the within writ are :—

"'John Holms, of 19, Cornwall Gardens, Kensington, Manufacturer, Charles Reed, of Earlesmead, Middlesex, Esq.

"'Dated this 6th day of February, 1874.

"'HENRY CHILD,

"'Returning Officer.'

"That no poll was in fact taken at divers polling places in the said Borough at the said election.

"That at divers other polling places in the said Borough the polling at the said election did not commence at eight o'clock of the forenoon, and continue and keep open during the day up to four of the clock in the afternoon, as by law required.

"That by reason of the matters aforesaid, divers and many voters of the said Borough were prevented from voting at the said election.

"And that by reason of the premises the said election was and is void.

"Wherefore your Petitioner prays that it may be determined that the said election was void, and that the said John Holms and Charles Reed were not duly elected or returned, and that the costs of and incidental to the presentation of this petition, and to the proceedings consequent thereon, may be defrayed by the Respondents."*

It was proved that the Borough contained about 41,000 electors, and for the purposes of the election it was divided into nineteen polling places, with an average of over 2,000 electors to each; that two polling places—namely, that at Church Road, Homerton, where 1,127 electors were entitled then and there

* A summons was taken out by the Respondents calling upon the Petitioner to show cause why this Petition should not be taken off the list, on the ground that the Petition was not a Petition within the meaning of the Parl. El. Act 1868, and did not disclose any facts which vitiate the return or give the Court jurisdiction. This summons was, after argument, dismissed.

only to vote, and at Percy Road, South Hackney, where 3,711 voters were similarly situated, were closed throughout the day, and that three other polling places—namely, Stamford Hill Ward, with 752 electors on the register; West Ward, 1,729 voters; and the De Beauvoir Ward, 1,455 voters—were only open for a part of the day. The result of this was that nearly 5,000 people were unable to vote, and a large number of other people were either prevented or might reasonably have supposed that they were prevented from voting. Mr. Holms received 6,968 votes, Sir Charles Reed 6,893, and Lieutenant Gill 6,310, thus giving Mr. Holms a majority over Lieutenant Gill of 658 votes, and Sir Charles Reed of 583.

Mr. *Bowen*, for the Respondents, submitted that the question for the Court to consider was whether the irregularity which had been proved to have occurred actually affected the result of the election, and prevented the real voice and choice of the majority of the constituency being heard and recorded. Would the Court set aside the election because a petitioner, who was not an elector, but a rival candidate, came forward and complained that a number of voters had been prevented by certain irregularities from giving their votes to his rivals?

Mr. Justice GROVE asked how he was to assume in what way the electors would have voted? Supposing in a constituency of over 1,000 electors 500 persons voted, and that it was alleged that the remainder who did not vote were Conservatives, and might, but for the circumstances, have turned the election, how could he tell the way in which they would vote, especially as under the Ballot Act every man's vote was held to be secret? Was it for him to determine whether certain persons by their promises, or otherwise, were Conservatives or Radicals? If so, there need be no further Parliamentary elections, as the parties would have only to go before a judge and state how many Conservatives and how many Liberals there were in their borough, and ask him to decide who should sit.

Mr. *Bowen* contended that it was open to him to prove that, had the polling-stations in question been opened, the result would in no way have been altered or affected. His clients, Mr. Holms

and Sir Charles Reed, represented what they believed to be an established Liberal majority in that constituency. He also called the attention of the Court to the 13th section of the Ballot Act, which provided that no election should be declared invalid by reason of a non-compliance with the rules contained in the first schedule to the Act, or any mistake in the use of the forms in the 2nd schedule to the Act, if it appeared to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of the Act, and that such non-compliance or mistake did not affect the result of the election.

Mr. Justice GROVE pointed out that he, as the election judge, had two questions to decide—namely, whether the election was conducted in accordance with the principles of the Act, and whether the non-compliance with the rules had affected the result of the election. He thought that the real point was whether the constituency had had an opportunity of fairly recording their votes for the different candidates. It would be sailing uncommonly near the wind, and, as he thought, violating the spirit of the Act, to inquire how a voter would have voted had circumstances been different.

Mr. *Bowen* urged, in conclusion, that there had only been a breach of some of the directions contained in the first schedule to the Act, but not such a violation of the statute itself as would vitiate an election. He was instructed that if the electors had voted in the two places in question they would have enhanced largely the already considerable Liberal majority.

Mr. Justice GROVE asked how he was to settle, if 3,000 voters were produced on either side who had promised to vote for either the Liberal or the Conservative candidates, in what way they would really have voted on the polling day. The argument of Mr. Bowen was that the *onus probandi* that the irregularities in question really affected the result of the election, and that another candidate would have been chosen instead of one of the sitting members, if things had gone on regularly, rested with the Petitioner. If so, it would be practically calling upon the election judge to decide from their expressed opinions or promises, which by the Ballot Act they were entitled to break, how certain people would have voted.

Mr. Justice GROVE, in his judgment, declared the election void.

After stating the facts as above, he said as follows:—

Effect on election of irregularity as to opening polling stations.

"Mr. Bowen has, I think I may fairly say, said everything which could possibly be urged in support of the election, and has presented a most ingenious and able argument upon the words of the statute. Still he was bound to admit that if the irregularity was so great as to prevent the election being a true election, that would avoid it even at common law. I certainly should not here take advantage of any admission of counsel upon which to found my judgment, but I am perfectly certain, as far as my judgment goes, that an election which is conducted in such a way as (whether by accident or by design) not to afford to a very large mass of the electors an opportunity of voting, cannot be a true election of members. And, therefore, for a moment leaving the Ballot Act out of the question, it appears to me that there was no real election here which was in any sense a fair representation of the views of the electors of the Borough of Hackney. Then does the Ballot Act in any way alter that? The section of the Ballot Act on which Mr. Bowen relied was the 13th. He contended that no election may be declared invalid unless both the conditions named in the Act are fulfilled, that is to say, unless it appears 'to the tribunal having cognizance of the question' that the election was *not* 'conducted in accordance with the principles laid down in the body of the Act,' and also, 'that such non-compliance or mistake' affected 'the result of the election' in this sense, that, but for such mistake, another candidate would have been elected. I have turned the matter over in my mind, and I cannot see, assuming that argument to express the meaning of that section, how the tribunal can by possibility say what would or might have taken place under different circumstances. It seems to me to be a problem which the human mind has not yet been able to solve, namely, if things had been different at a certain period, what would have been the result of the concatenation of events upon that supposed change of circumstances. I am unable at all events to express an opinion upon what would have been the result, that is to say, who would have been elected provided certain matters had been complied with

here which were not complied with. It was contended that I might hear evidence on both sides as to how an elector thought he would have voted at such election. That might possibly induce a person not sitting judicially to form some sort of vague guess, but that would be far short of evidence which ought to satisfy the mind of a judge of what any individual who might express that opinion would really do under what might have been entirely changed circumstances. But, besides that, one of the principles of the Ballot Act is that voting should be secret, and voters are not to be compelled to disclose how they voted except upon a scrutiny after a vote has been declared invalid. Notwithstanding that, I am asked here, assuming the construction for which Mr. Bowen contends to be correct, to ascertain how either the 41,000 electors of this Borough, or any number of them, might have wished to vote had they had the opportunity of doing so, and what in that event would have been the result of the election. It seems to me that such an inquiry would not only have been entirely contrary to the spirit of the Act, but also that it would be a simple impossibility. I should, therefore, say that even if the wording of the Act, taking it literally and grammatically, required me to put such a construction upon it, it would lead to such a manifest absurdity (using now the judicial term which has generally been used with reference to the construction of statutes) that unless I were in some way imperatively obliged, and unless the Act could by no possibility admit of any other construction, I should not put a construction upon it which really reduced the matter to a practical impossibility. Such a construction would practically render it necessary, in the case of any miscarriage at an election, however great the miscarriage might be (if, that is to say, only a very small number of persons had voted, and all the rest of the Borough had been entirely unable to vote) that the judge should then enquire as to how the election would have gone. As I ventured to remark in the course of the argument, where a miscarriage of this sort took place it would be virtually placing the election not in the hands of the constituency, but in the hands of the election judge, who is not to exercise a judgment as to who is to be the member, but who is only to see whether the election has been properly conducted according to law.

"Let us now see whether this 13th section does not fairly and reasonably admit of a different construction. The words of the section are, 'No election shall be declared invalid by reason of a non-compliance with the rules . . . . if it appears to the tribunal . . . that the election was conducted in accordance with the *principles laid down in the body of the Act.*' No doubt nothing can be more difficult than for a judge or for a metaphysician or for anybody to say what are the principles of a statute which consists, together with the schedules, of upwards of 100 sections. One principle of the Act, as I have said, is doubtless that the voting should be secret, and when I look at the provisions for district polling places and polling stations, my impression is that another principle of the Act (which indeed must be a principle of all Acts for the representation of the people) is that the electors should have a fair opportunity of recording their votes. If that be not the principle of the Act one can hardly understand the Act being suitable for the purpose of recording the votes of those upon whom the Legislature has thought proper to confer the franchise. Then is it in accordance with the principles of the Act that a large proportion, amounting to several thousands of the electors, should be absolutely deprived of the power of voting, and that a large indefinite number, which we cannot ascertain, should also have impediments presented to their voting, which may, and doubtless did, prevent a very considerable number of them from voting at all? Among the principles of the Act is one that there should be districts arranged for the convenience of the electors, at which they might have at the polling day suitable machinery for giving their votes to the candidate to whom they chose at the last moment to give their vote. And since the Legislature has now reduced the time for polling to one day, it is more important that there should be means fairly taken to give to the electors the opportunity of voting with as little trouble as possible. When elections lasted a fortnight many matters could be remedied, and if people could not vote one day they might vote on another day; but now that it is crowded into one day, it is more important that there should be proper opportunities for the voters to record their votes without unnecessary trouble. Can I say that it is in accordance with the

principles of this Act that such a large number of voters should be practically rendered unable to tender their votes? It therefore apparently rests with me to say, and I do say, that this election was not conducted in accordance with the principles laid down in the body of the Act.

"The Act further says that the election is not to be declared invalid if it appears to the tribunal that 'such non-compliance or mistake did not affect the result of the election.' I am by no means satisfied that in this case the non-compliance or mistake did not affect the result of the election. In saying that I am very strongly inclined to think that the expression 'the result of the election' does not in this Act necessarily mean the result as to another candidate having been elected at the poll. The result may be of various kinds. The result of the election would, in my judgment, be affected if, instead of a majority of 500, there was a majority of only ten, or even of 100. Upon a scrutiny the matter might be very different. Other causes might also produce a very considerable change of relation between the parties, and might have a very important effect upon the ultimate, if not upon the then present, representation in Parliament, that effect depending upon the magnitude of the majority. It will also be observed that the words used in the section are not, 'did not *alter* the result of the election,' but, 'did not *affect* the result of the election.' Does not the word 'affect' mean substantially 'bear upon the result?' When fairly and substantially viewed by the tribunal having cognizance of law and fact, was what occurred reasonably calculated to affect that election? In my judgment it was. I myself cannot say, nor, as I have already remarked, so far as I am aware, can any human being say whether it altered or would have altered the result of the election if, instead of the number who were actually polled upon this occasion, the whole 41,000 electors had been polled. I see no reasonable possibility of fairly pronouncing an opinion upon the point, and, therefore, if I were required to construe the statute in that way (which I do not feel by any means obliged to do), I should say that it really demanded an impossibility, that it demanded of me to know, what no human being could know, that is to say, to know what would be the course of events under changed conditions and altered circumstances. I am here

to give a fair rational construction to the Act. The leading words are, first, 'if it appears to the tribunal that the election was conducted in accordance with the principles laid down in the body of the Act' (and I am of opinion it was not so conducted), and secondly, 'that it did not affect the result of the election.' I cannot say that I am at all satisfied that it did not affect the result of the election, and in one sense I may say that I feel a strong opinion that it did more or less in a substantial degree affect the election, so that the result might have been changed had the whole of the electors been enabled to vote.

"If I look to the whole, and to the sense of it as a whole, it seems to me that the object of the Legislature in this provision is to say this—an election is not to be upset for an informality or for a triviality, it is not to be upset because the clerk of one of the polling stations was five minutes too late, or because some of the polling papers were not delivered in a proper manner, or were not marked in a proper way. The objection must be something substantial, something calculated really to affect the result of the election. I think that that is a way of viewing it which is consistent with the terms of the section. So far as it seems to me, the reasonable and fair meaning of the section is to prevent an election from becoming void by trifling objections on the ground of an informality, because the judge has to look to the substance of the case to see whether the informality is of such a nature as to be fairly calculated in a reasonable mind to produce a substantial effect upon the election.

"That being my construction of the section, I cannot say, considering the very large number of electors who have been disabled from voting upon the present occasion, that it has been an election which may fairly be taken to represent the voices of the electors of Hackney. Although no doubt it is a matter which one cannot view without some regret, that innocent parties who have expended time and trouble and money in the election should be put to this inconvenience, and that the election should now turn out to be a nullity, I cannot look at the consequences. I am here to pronounce the law to the best of my judgment, and in my judgment the law fairly applied, both at common law and according to this statute, is that the late election for the Borough of Hackney is void."

Costs.

As to costs, Mr. *Barnard* addressed the Court on behalf of Mr. Henry Child, the Returning Officer, who had been made a Respondent in the cause. He explained that a Returning Officer was an unpaid official, and received no remuneration whatever for his duties at an election. It was his simple task, as far as money matters were concerned, to obtain a deposit from each of the candidates wherewith to defray the cost of the poll, and having done so to return the balance, if any, to them. Mr. Child had been the Returning Officer for the district for no less than thirty-five years, and at no previous election, during the whole of that period, had any mishap occurred. He had always employed the same contractor for stationery and the materials for polling. Under the Ballot Act only three days were allowed to provide everything necessary for the election, and that, he thought, hardly afforded sufficient time for the enormous amount of work which had to be done. In this instance the day of nomination was the 30th of January, and, a poll being demanded, the Returning Officer, acting for the time as the agent of the candidates, received 400*l.* from each of them as a deposit for the purpose of providing the materials for the polling. Orders were immediately given for the preparation of the necessary ballot papers (numbering no less than 41,000, and each bearing a distinctive mark and number), ballot boxes, stamps, and, in fact, everything necessary for the election. Polling booths and stations were constructed, presiding officers and clerks were appointed, and all was in readiness. The Returning Officer and his son and partner made frequent inquiries at the printer's if all was going on smoothly, and it was arranged by them that the ballot boxes and papers should be delivered at each station on the night before the polling-day, and left in charge of a responsible person until the time arrived for opening the booths. Notwithstanding all these precautions, the printer (a Mr. Collier) failed to carry out his contract, and it was this which had caused the *fiasco*. He urged, in conclusion, that the Returning Officer, who was, he repeated, an unpaid official, was in no sense an insurer, that he had used due diligence and every reasonable precaution to conduct the election successfully, and that it would be hard and unjust, under the circumstances, to mulct him in the costs of the petition, especially as he had suffered already by being superseded in his appointment.

Mr. Justice GROVE, in his judgment, said as follows :—

"I should have had no difficulty on that matter in this case provided that there had been only the Petitioner and the sitting members, for I think that both Petitioner and members are so perfectly exempt from blame in the matter that, although they must incur expenses in reference to this petition, still of all cases that have yet been decided this is certainly a case in which neither of the parties should be called upon to pay the costs of the other. But a third question intervenes—namely, by whose fault has this been occasioned? If I clearly saw my way to a jurisdiction in this matter I might have pronounced an opinion upon that question, but having considered the words of the statute,* I am by no means clear that I have such a jurisdiction as would bear upon that particular matter, and, besides, I am by no means sure that if I had such a jurisdiction, and were to exercise it, I might not perhaps wrong one or other of the parties by prejudicing a remedy to which they may conceive they are entitled. In saying this, I must not be taken as expressing any opinion as to whether they have a remedy or not, or whether they ought to have one. Upon the whole I think that the best decision I can come to with regard to costs in this matter is, without expressing any opinion upon the responsibility of the Returning Officer or upon what his liability is (for I think it is always desirable for a judge to do as little as he can in the way of expressing extra-judicial opinions), to make no order as to costs."

* Parl. El. Act, 1868, §§ 41, 51.

CASE XV.

BOROUGH OF WINDSOR.

BEFORE MR. BARON BRAMWELL, APRIL 21, 1874.

Petitioners: Herbert and another.

Respondent: Mr. Richardson Gardner.

Counsel for Petitioners: Mr. Murphy, Q.C.; Mr. Biron; Mr. Nash.

Agent: Mr. Darvill.

Counsel for Respondent: Mr. Giffard, Q.C.; Mr. Julian Robins.

Agent: Mr. C. T. Phillips.

THE petition contained the usual allegations of corrupt practices, but did not pray the seat.

Evidence was given in support of the charge of bribery by agent, but the agency of the briber was not established. In support of the charge of intimidation it was proved that the Respondent had evicted a number of tenants after the election of 1868 because they had voted against him, but it was not proved that this conduct on his part, although, as the judge observed, it was very reprehensible, did as a fact unduly influence any voters at the last election, consequently it could not be considered as a corrupt practice within the meaning of the Corrupt Practices Prevention Act 1854, so as to avoid the last election.

In the course of the case,

It was proved that one Pantling wrote a letter to a voter named Juniper, who at the time of the election was away from

the borough, offering to pay his travelling expenses if he would come and vote; and it was admitted that this offer, if made by the Respondent or an agent of his, would have unseated him. The only evidence of Pantling being an agent was that he was a member of a committee which had been formed for the purpose of promoting the Respondent's election. It was not proved who put him on the committee, or how he got there, what his duties were, or what he did; but his own statement as to this was that he understood that his duties were to do the best he could for the Respondent.

A member of a political committee not necessarily an agent.

Mr. Baron BRAMWELL, in his judgment, said as to this:—"I am invited to believe that in some way or other a man who has given no description of himself, except that he was on a committee, was an agent, so that his act in writing this letter should unseat the Respondent. It appears to me really impossible to hold that he was an agent. I think that according to the authorities,* and according to the good sense of the matter, he was not an agent. He has given us no account of how he came to write this letter to Juniper, he having told him where he had gone to and having told him to write upon the occasion of an election. I cannot help agreeing with Mr. Giffard that if we were to hold this man to be an agent it would make the law of agency as applicable to candidates positively hateful and ludicrous."

Colourable charity.†

It was proved that the Respondent, some long time before the election, gave away about £100 among his tenants, some of whom were voters and some not, and who paid him altogether about £3000 a year in rent. This money was spent in coals, beef, and tea, and the Respondent, on being asked whether, when he made those gifts, he had in view the election for the borough, admitted that to a certain extent he had. It was then argued that the gift of this money was a corrupt act, on account of which the Respondent should be unseated.

* Staleybridge, vol. i. 67; Westminster, *ib.* 92; Blackburn, *ib.* 200; Dublin, *ib.* 272; Taunton, *ib.* 183; Wigan, *ib.* 189; Galway, vol. ii. 53. See also Newry, P. & K. 151; Bristol, P. & K. 574.

† It was similarly decided by Willes, J., Windsor, vol. i. 2, and per O'Brien, J., in Youghal case, *ib.* 294. See also Hastings, *ib.* 218.

Mr. Baron BRAMWELL, in his judgment, said as to this :—"It is certain that the coming election must have been present to his mind when he gave away these things. But there is no harm in it if a man has a legitimate motive for doing a thing, although in addition to that he has a motive which, if it stood alone, would be an illegitimate one. He is not to refrain from doing that which he might legitimately have done on account of the existence of this motive, which by itself would have been an illegitimate motive. If the Respondent had not been an intending candidate for the borough, and yet had done as he has done in respect of these gifts, there would have been nothing illegal in what he did, and the fact that he did intend to represent Windsor and thought good would be done to him and that he would gain popularity by this does not make that corrupt which otherwise would not be corrupt at all.

Admissibility of evidence as to acts of intimidation at a previous election.
(2) 3.

James West was asked by Mr. Murphy for the Petitioners :—

Q. Were you a tenant under the Respondent at the time of the election of 1868 ?

A. Yes.

Q. Were you canvassed by him ?

A. Yes.

Q. What occurred between you and him when he canvassed you for the election of 1868 ?

Mr. *Giffard*, for the Respondent, objected to the question as irrelevant to the present issue. He submitted that the Court was not trying what took place at the election of 1868.

Mr. *Murphy* :—"It is relevant to this issue, because it shows that the Respondent, by means of terror, endeavoured to prevent any of his tenants from voting against him at any future election. The mischief is not confined to an individual, because terror is struck among all placed in a similar position." He referred to the judgment of Mr. Justice Willes in the Blackburn case.*

Mr. *Giffard* :—"Then this is an act of intimidation, according to my learned friend, the effect of which may continue for all time."

Mr. *Murphy* :—"I think it is."

* Vol. i. 204.

Mr. Baron BRAMWELL:—"Mr. Murphy says he dismissed a number of people and established a reign of terror, and did the act before the eyes of those who remained. I do not think I can reject this evidence."

Effect of act of intimidation committed before the election must be shown to be continuing at the time of election.

It was then proved that shortly after the election in 1868 the Respondent turned out a number of persons who were his tenants because they had voted against him at that election.

It was argued that this conduct on the part of the Respondent with regard to the election in 1868 had the effect of intimidating the tenants at the present election, and in fact amounted to undue influence within the meaning of the Corrupt Practices Prevention Act, 1854, s. 4.

Mr. Baron BRAMWELL, in his judgment, said as to this:—"There is no doubt that those men were turned out after the election of 1868 because they obeyed the dictates of their consciences, and voted accordingly. I find that fact against the Respondent, and if it were enough to unseat him I would do so gladly; but I do not think it is. It is not the way in which those men were treated after the election in 1868 that affects the case, but the question is whether the treatment operated on the minds of others at the subsequent election. Practically a threat was held out that if the new tenants on a future occasion exercised their franchise against the Respondent, they would be turned out also. To my mind it was a threat, and could I but have found that that threat had been in operation at the time of this election, I should have said that, although the threat was made in 1869, still it was a threat to influence the voters at this election, and that it was a corrupt practice. To my mind a threat must be an operative threat at the time of the election, and if it were a bribe it must be an operative bribe at the time of the election. An offence might be committed, although the bribe were not operative at that time. Supposing it were known that there would be a dissolution of Parliament, and the Respondent threatened that if his tenants did not vote for him he would turn them out, that would be a threat at the time of the election. That is an extreme case to show that the threat need not be made at the very time the election is going on. On the other hand, one may put a case to show that it must be a threat or bribe

continuing in operation. Supposing, for instance, a man were bribed to vote at an election, and died five years after he had been bribed, and then after his death the election took place, is it imaginable that that election could be avoided on account of that bribery? It cannot be. Supposing next, that a man was bribed to vote at an election, but before the election took place, both the briber and the voter repented, and the voter returned the money, would that be bribery at the election? I think not. Unless you can show that the bribery or threat is one the force of which is in existence, continuing till the time of the election, although the bribe or threat which has been given or made may have subjected the parties to penalties, it is not a bribe or threat which will avoid the election. Assuming as I do that these tenants were threatened at the time of the evictions, and assuming that some of them continued to be voters at the time of the last election, I think the effect of the Ballot Act, combined with the non-enforcement of the promise (if I may use such an expression) by the Respondent, had the effect of preventing the threat being one operative at the time of the last election. I think so because the effect of the Ballot Act is that a man can vote with safety according to his conscience, and the threat can have no operation upon him unless you suppose he is going to be asked afterwards how he voted. But if it had been intended that the threat should be continued operative, what would have been the way in which it would have been done? Suppose a plain case, which is not very likely, because it would be fatal to do it. Suppose the Respondent had gone to the tenants and said, 'Do you remember those voting against me the last time were turned out?' 'Yes I do, very well.' 'Unless you promise me you will vote for me you will be turned out.' I think that would be a threat, and a continuance of the old threat. And I think if any equivalent conduct had taken place, I think if he had not exacted a promise that he should vote for him, but had said, 'I want you to promise me,' any man would know what that meant, 'Out I go, if I don't vote for you,' that would be a continuance of the old threat, because, although he might have gone and broken his word, yet a man, having promised, might have felt himself bound to vote, and then would have been voting

under the influence of the threat. I do not know whether that is too recondite a consideration; if ever a case should arise, possibly it may be that those who decide it may take a different view from the one I suggest. But what I have to decide is, Has a corrupt practice been made out at this election? and I am compelled to say that a case of corrupt practice by an undue influence has not been made out."

Mr. Baron BRAMWELL, in his judgment, declared the Respondent duly elected.

As to costs, he said as follows:—"Although I have come to the conclusion that a case of corrupt practice by undue influence has not been made out,* it must not be supposed for a moment that I hold the Respondent blameless. I never wish to go out of my way. I have been too long upon the bench to take any pleasure in scolding people, but with reference to the decision I have come to upon this part of the case, I think it right to say that the conduct of the Respondent ought to be severely condemned. Turning out those men in the way he has, he has acted as no just man and no gentleman would have acted; and I am surprised that any one should try to get into Parliament by such means. I find no fault with a man trying to become a person of influence in a borough by acquiring property. He may say, 'If I become the owner of such a quantity of property and come in contact with a great number of people, who find I behave myself properly in my dealings with them, they will think I am a proper person to be returned to Parliament,' I think that is a legitimate mode of influence. And I go further. If there is a choice between two tenants, and one agrees with him in politics and the other does not, I do not think it wrong if he takes the tenant who agrees with him. But that a man should not only do that, but that he should endeavour to coerce their opinions and make them give up their rights, contrary to their inclinations, is, I think, most mischievous. I should not, however, have said this, if it had not a most important bearing upon the only remaining matter that I have now to dispose of, and that is the costs. I certainly think the Respondent has brought upon himself this inquiry; and therefore, though I feel bound to declare he is duly elected, I shall leave him to pay his own costs." Costs.

* As to this see above, p. 91.

CASE XVI.

BOROUGH OF PETERSFIELD.

BEFORE MR. JUSTICE MELLOR, APRIL 21, 1874.

Petitioner: Henry J. D. Stowe.

Respondent: Hon. S. H. Jolliffe.

Counsel for Petitioner: Mr. Serjeant Ballantine; Mr. J. O. Griffits; Mr. C. Bowen.

Agents: Messrs. Soames.

Counsel for Respondent: Hon. A. Thesiger, Q.C.; Mr. W. G. Harrison; Mr. Couch.

Agents: Messrs. Rogerson and Ford.

THE petition contained the usual allegations of corrupt practices. It also alleged that many persons voted for the Respondent who were disqualified from voting, or not qualified to be upon the register or to vote, and that consequently the majority of the voters for the Respondent was only an apparent and colourable majority over the unsuccessful candidate, William Nicholson; and it prayed the seat for William Nicholson.

In the course of the case,

What is sufficient evidence of a threat of eviction.

It was proved that twelve years before the election Mr. Carter had let a cottage to one Goold (who was not at the time a voter) on the condition that if ever there should be an election, and the Respondent's party wanted a vote, Goold would give his vote for the Respondent's party. Goold had been waiting three years for

the cottage, and it was a great advantage to him to get it. A few days before the poll the Respondent and Carter called at Goold's house, and asked Goold's wife whether her husband would vote for the Respondent. Upon Mrs. Goold hesitating to promise the vote, Carter said, "I think it was named to your husband when he took the house. Mrs. Goold then answered, "I have no doubt but what he will."

Mr. Justice MELLOR, in his judgment, said as to this case as follows:—"I confess that if this had been a recent letting, and that if it had been a condition that the tenant should vote as the landlord dictated, and then the landlord's agent, in the presence of the sitting member, had referred to the condition when canvassing the tenant, I should have been very slow indeed to decide that that might not be a case of undue influence. But I must take all the circumstances together. Twelve years ago Mr. Carter let this house to Goold as a monthly tenant at 1*s.* 6*d.* a week. It is evident (and I cannot shut this out from my mind) that it was an advantage to Goold to have the house; he said he had been waiting three years for the opportunity of getting the house, and therefore he got something which he desired to have. Could I have come to the conclusion which my brother Ballantine invites me to come to, that there was any semblance of a threat in what passed in the presence of the Respondent, I should certainly have held that it was undue influence sufficient to unseat the Respondent."

At the conclusion of the evidence given in support of the allegations of corrupt practices,

Mr. Justice MELLOR delivered judgment as to these allegations, and stated that in his opinion nothing had been proved which affected the Respondent's seat.

Before the scrutiny was commenced,

Mr. Serjeant *Ballantine*, for the Petitioner, submitted that the time had now arrived when the recriminatory case should be heard and decided.

Hon. A. *Thesiger*, for the Respondent, then stated that the charges of corrupt practices against the Respondent having failed,

he did not propose to proceed with the counter-charges against the Petitioner.

The scrutiny was then gone into.

Mr. *Griffits*, for the Petitioners, said that he would commence with the class of voters who were alleged to have received parochial relief subsequently to July 31, 1873, the date of the last registration.

Hon. A. *Thesiger*, for the Respondents, submitted that by s. 7 of the Ballot Act the register was made conclusive; it was not clear, therefore, that receipt of parochial relief by a person whose name was on the register, would disqualify him from voting.

Mr. Justice MELLOR stated that if necessary he would reserve the point for the Court of Common Pleas.*

Mr. Serjeant *Ballantine* asked his Lordship to reserve also, if necessary, the case of certain voters receiving alms under the will of a person deceased.

Mr. Justice MELLOR agreed to do so.

Receipt of parish relief, how proved.

The vote of John Fortescue was objected to on the ground that he had received parish relief.

The parish doctor, on being called, stated that in December, 1873, he attended the children of John Fortescue, although he had received no special order from the relieving officer to do so. He was frequently in the habit of attending persons whom he knew to be entitled to parish relief without having previously received any special order from the guardians.

Mr. *Thesiger*, for the Respondent, submitted that, as the medical attendance in this case had been obtained without an order previously from the relieving officer, this case did not come within the statute.†

Mr. Justice MELLOR stated that in his opinion it is sufficient if it was proved that the patient had been attended by the parish doctor as a pauper patient, a return of his attendance having been

* See the decision of the Court, Stowe *v.* Jolliffe, L. R. 9, C. P. 734.

† 2 Will. IV. c. 45, s. 36.

afterwards made to and ratified by the guardians, and that the production of an order from the relieving officer given previous to the attendance was not essential, although desirable.

The vote of John Fortescue was then examined, and struck off.

Occupation by servant when colourable only.

The vote of Henry Powell was objected to on the ground that he was not an occupier, but merely a servant.

It was proved that Powell was paid 16*s.* a week wages, from which a shilling a week was deducted for rent of the house he lived in. His duty was to look after the cattle on the farm, but this he could not do unless he lived in this house.

Mr. *Thesiger*, for the Respondent, submitted that in this case there was a relation of landlord and tenant created.

Mr. Justice MELLOR said that this case was just upon the dividing line, but upon the whole he should sustain the vote.

In the next case of George Blunding, the facts were similar to those in the last case, except that the voter received 18*s.* a week wages, and there was no express stipulation about any deduction from his wages for rent.

Mr. Justice MELLOR held that this was not a good vote.

In the next case of Thomas Aylward, it appeared that the cottage in which he lived belonged to his master, and that 6*s.* a month was deducted from his wages by way of rent. His master, on being called, stated that Aylward was a weekly servant, with his cottage by the month—that is to say, he would be entitled to stay in his cottage one month after leaving, but the cottage was merely an appendage upon the labour, and was there merely for the convenience of the farm. He was asked, "Should you take any one into it who was not a servant of yours?"

A. Certainly not.

Q. And he is not free to leave your service, and remain in the cottage?

A. Certainly not.

Mr. Justice MELLOR, after an adjournment, said as follows as to these votes:—"I have come to the conclusion that I was a little hasty in allowing the one vote that I did allow, but as that

is allowed I shall not reopen it. I think the guiding principle in all these cases is, 'Is the house auxiliary to the service?' I do not mean to say that that is decisive, because in each of these cases, as far as I can see, it is always a question of fact, and whenever a decision is come to by the Court upon a case stated by a revising barrister, it is generally ended in this way, that 'the revising barrister has so stated the case that the Court cannot see that he was wrong, but they rarely lay down anything that can be taken as an affirmative guide. I think the distinction between the two cases may be shown by cases which exist in Lancashire and Derbyshire, where there are usually attached to a mill forty or fifty houses, and the owners require that all persons who get work at the mill shall occupy these houses, provided there is a house vacant; if there is not, they let them live anywhere else. In that case it is not auxiliary to the service, but the landlord requires it for his own profit and convenience, because having the security of the man's work for his rent, he lets him the house, say at 2*s*. a week, and he requires the man to take the house if there is one vacant, but if there is not, the man lives elsewhere. It is, therefore, not auxiliary to the employment, but an independent occupation. In all these cases the rating is not the actual test; the occupier may be rated or not; he may bargain with his landlord, and let him pay the rate, and yet the tenant may be entitled to his vote quite independently of the rating. So it may be that a certain sum per week may be cut off from what would otherwise be wages in respect of the occupation of a house. But if the bargain is this, 'You shall have 15*s*. a week and the use of the house,' then I am satisfied that it is in the occupation of the employer, and that it is not an independent tenancy. Just as in the case of a gamekeeper, who occupies a house in the centre of a gentleman's preserves, and has so much a week and a house to live in, the house is not the keeper's as a tenant, but he occupies it for the purpose of discharging his duties as gamekeeper to the gentleman. So also with regard to a gardener; and there are many other instances of the same kind. Therefore, that being so, I am disposed to think that this vote (of Aylward's) must go. I do not mean to say that there may not be an agreement between a master and a servant as to the occu-

pation of a house belonging to the master, I am only saying what is the presumption of fact which I must arrive at upon the evidence as to this particular case. I do not at all mean to say that the relation of master and servant may not coexist with an independent occupation."

At the conclusion of the scrutiny,

Mr. Justice MELLOR said: "I understand that the learned counsel on either side will frame a case for my approval, to be submitted to the Court of Common Pleas, and if there is any difference they must come before me. My labours, therefore, are now all terminated except with regard to the question of costs." Costs.

Mr. Serjeant *Ballantine* called attention to the fact that a recriminatory case had been put upon the record, and subsequently withdrawn.

Mr. Justice MELLOR: "I have considered that point, and I think the Petitioner must pay the costs of the petition as far as the general allegations of corrupt practices are concerned. The costs of the scrutiny must abide the event of the decision of the Court of Common Pleas. As to the recriminatory case, the rule of all the judges is, that, whatever may have been in the pleadings, the costs ought to follow the decision upon the merits of the case. We cannot enter into a nice discussion as to dividing the costs further than that, if it should turn out to be a double return (I do not suppose it will), then I should think that each party ought to pay his own costs."

CASE XVII.

BOROUGH OF WAKEFIELD.

BEFORE MR. JUSTICE GROVE, APRIL 21, 1874.

Petitioners: Messrs. Lee and Briggs.

Respondent: Mr. E. Green.

Counsel for Petitioners: Mr. Hawkins, Q.C.; Hon. E. Chandos Leigh.

Agents: Messrs. Van Sandan and Cumming.

Counsel for Respondents: Mr. Charles Russell, Q.C.; Mr. Forbes.

Agents: Messrs. Fernandez and Gill.

THE petition contained the usual allegations of bribery and treating, but did not pray the seat.

By the evidence adduced a number of cases of bribery by agent were clearly established.

Mr. Justice GROVE, in his judgment, declared the election void on the ground of bribery by agent.

Credibility of evidence given by bribed persons.

As to the value of the evidence given by persons who allege that they have been bribed, he said:—"It is perfectly true that where witnesses are called to prove that they themselves were bribed, their testimony is open to suspicion, varying in degree with the circumstances under which that testimony is given, and its effect upon the judge must depend a good deal upon the demeanour of the witnesses, and to such circumstances as may transpire to lead to any fair or well-founded opinion as to whether, although they are tainted with the necessary admission

that they have been guilty of improper practices, they are so tainted that their evidence is to be disbelieved altogether, or whether what I may call the circumstantial value of their evidence is such that they may be believed, although they do not come forward in a reputable character. There are no infallible rules to be laid down upon such a matter as this, and very slight differences may turn the scale and influence the mind of the tribunal, as to whether the witness is to be believed or not. The answer to one or two questions, the mode of the answer, the observation as to whether there is anything evasive, or whether the witness fairly makes what is commonly called a clean breast of it in an honest and straightforward way; all these are matters for consideration by the tribunal. Independently of this there are also the sources from which the evidence comes, as, for instance, supposing that three or four witnesses come from what may be considered a prejudiced source, indicating something in the nature of a conspiracy, or that on the other hand they come from such a variety of different sources that it is not likely or would not be reasonable to presume that they had all been induced, without any apparent reason, or without any single predominating motive, to come and tell a series of falsehoods. All these circumstances and a vast number of others have to be looked at, some of them so delicate and difficult of appreciation that they hardly admit of being described in words as to their effect upon the mind of a judge who tries a case of this description.

"The reason why I rather dwell upon this matter is, that the public should know that these petitions are being tried by men, the judges of this country, who have generally as barristers had a long experience in dealing with evidence in courts of justice, and therefore people will very much delude themselves if they suppose that by keeping within some particular dicta or expressions of the learned judges they can creep out of the difficulty, which is virtually a difficulty of conflict of intellect. Corruption will try to beat the law, but generally speaking, and in the long run, I think I may say universally, the law will end in defeating corruption; because so long as society can hold together in a

civilized state, it has and always will have on its side the strongest, the most honest, and the most penetrating minds. Therefore with whatever impunity people may think that they can perpetrate corrupt practices by avoiding as they suppose the difficulties which have been fallen into in other cases, they will probably make a very great mistake, because they will find at each new inquiry means of getting at the truth which they little thought of when they were measuring the new inquiry by the past."

As to agency, he said :—

Evidence sufficient to establish case of agency.

"It was proved that the Respondent was vice-president of a certain society, that he spoke at meetings of that society, that many of the members of that society were to his knowledge active partisans of his, and were actively canvassing for him, that there were certain rooms belonging to this society, which might in one sense be called committee-rooms, but which were not committee-rooms in the old sense of being occupied by a certain fixed committee. These rooms were placarded with the Respondent's name, and at them business in connection with the election was transacted. These facts would *primâ facie* bring the case within the law of agency, and would be sufficient to satisfy a tribunal that the Respondent had put himself, or allowed himself to be in the hands of certain persons, or had made common cause with them so as to make himself liable if they, for the purpose of promoting his election, committed acts of bribery. In saying this there is not the slightest personal imputation upon the Respondent. By election law the doctrine of agency is carried further than in other cases. By the ordinary law of agency a person is not responsible for the acts of those whom he has not authorised, or even for acts done beyond the scope of the agent's authority. If a man gives another person authority to buy a horse for him he is responsible for the acts of that person in that transaction, if he gives him a general authority to act in his business for him he is responsible for all his agents' acts, but he is not responsible for the acts which his alleged agents choose to do on their own behalf. But if that construction of agency were put upon acts done at elections, it would be almost im-

possible to prevent corruption. Accordingly a wider scope has been given to the term 'agency' in election matters, and a candidate is responsible generally, you may say, for the deeds of those who to his knowledge for the purpose of promoting his election canvass and do such other acts as may tend to promote his election, provided that the candidate or his authorised agents have reasonable knowledge that those persons are so acting with that object. I think it well that I should say in this respect that here it is almost impossible for any judge to lay down such exact definitions and limits as shall meet every particular case, and it is extremely important that the public should know that, because, were it otherwise, were I for instance on the present occasion to pretend to lay down an exact definition of what constituted agency at an election, possibly in some other case that particular definition might be evaded, although what came to substantially the same thing might have taken place. Happily there is sufficient elasticity in the law to prevent that being the case; and here again those who think that they can evade the law by just creeping out of the words which learned judges use, or even which tribunals use, upon a matter of this sort, which is partly law and partly fact, will generally find that they are very much mistaken. It is therefore well that it should be understood that it rests with the judge, not misapplying or straining the law, but applying the principles of the law to changed states of facts, to form his opinion as to whether there has or has not been what constitutes agency in these election matters. It is well that the public should know that they cannot evade the difficulty by merely getting, as they suppose, out of the technical meaning of certain words and phrases."

As to the nature of the inquiry he said:—

Nature of the inquiry and duties of the judge.

"Under the Parliamentary Election Act, 1868 powers are given to a judge which may be exceedingly useful for the purpose of aiding inquiries of this sort, but it appears to me to be perfectly impossible that a judge can take upon himself to inquire into the conduct of a whole constituency, or call witnesses before him and treat them as if he were an adverse counsel testing their evidence by cross-examination, because he has not materials for doing so,

and because it would be entirely a non-judicial proceeding. It appears to me that the powers given to the judge by this Act are rather in aid of the truth of this inquiry, and I cannot see that he can institute or carry out an inquiry himself."

Costs.

Costs followed the event.

CASE XVIII.

BOROUGH OF BARNSTAPLE.

BEFORE MR. JUSTICE MELLOR, APRIL 27, 1874.

Petitioners: Messrs. Fleming and Holt.
Respondents: Mr. T. Cave ; Mr. S. D. Waddy.
Counsel for Petitioners: Mr. W. G. Harrison ; Mr. Collins.
Agents: Messrs. Stevens, Wilkinson, and Harries.
Counsel for Respondents: Mr. Serjeant Parry ; Mr. Tennant.
Agents: Messrs. Wyatt, Hoskins, and Hooker.

THE petitions contained the usual allegations of corrupt practices, but did not pray the seat.

The evidence adduced by the Petitioners was insufficient to establish a case.

Mr. Justice MELLOR, in his judgment, declared both the Respondents duly elected.

As to the law of agency, he said as follows:—

"I quite think the election law is a cruel and somewhat hard law,* yet it is too well settled for an election judge to act contrary to it. I say that if an agent, although he may be no agent to the candidate, be employed by the agent of a candidate, he is a sort of subordinate agent, and if he is employed by persons who have authority to employ people to further the election of a particular individual, and in the course of canvassing makes use of a threat or a promise, such an act will make the

Liability of candidate for acts of persons employed by agent.

* See a similar remark of Keating, J., in Norwich case, ante, p. 41, and per Martin, B., Westminster, vol. i. 95.

candidate liable, however innocent the candidate may be, or however careful the candidate may have been to avoid such conduct.* As Mr. Harrison very fairly puts it, he cannot take the benefit of the services of the individual and repudiate them at the same time. But the judge must be satisfied that the man, when he was acting, was acting as the agent for furthering the election of a particular candidate. This, as my brother BLACKBURN has stated it,† must be a question of more or less—it must depend upon the actual belief of the judge."

As to the effect of properly conducting an election, he said:—

Effect of properly conducting an election.

"Looking at the mode in which this election appears to have been conducted generally, and the small expenditure incurred, I am induced to adopt the dictum‡ of my brother MARTIN, and to say that where it is evident that it was intended that an election should be honestly conducted, and where the expenditure shows that the parties contemplated only that which was honest and legitimate, I should require very conclusive evidence to induce me to declare it void."

As to costs, he said:—

Costs.

"Upon the question of costs I hold a very strong opinion. I cannot balance how much ground may have presented itself to the minds of the persons who are Petitioners, unless there be some manifestly flagrant act upon the part of the sitting members which was calculated to lead them into a petition, although ultimately it might turn out to be unsuccessful. There are cases, but they are very few (one was mentioned by my late brother WILLES in a judgment of his,§ and my brother BRAMWELL the other day‖ acted much upon the same principle), in which each party has had to pay their own costs. But in this case I can see nothing to take it out of the general rule, and my determination therefore is that the Petitioners must pay the expenses of this inquiry."

* See similar remarks of Blackburn, J., in Bewdley case, vol. i. 18, and Staleybridge case, vol. i. 69.

† Staleybridge, vol. i. 70.

‡ Wigan, vol. i. 192, cited by Grove, J., Taunton, ante, p. 75.

§ *Semble*, Guildford, vol. i. 15.

‖ Windsor case, ante, p. 93.

CASE XIX.

BOROUGH OF STROUD

BEFORE MR. BARON BRAMWELL, APRIL 28, 1874.

Petitioners: Baynes and others.

Respondents: Mr. Stanton and Mr. Dickinson.

Counsel for Petitioners: Mr. Serjeant Ballantine; Mr. Giffard, Q.C.; Mr. A. L. Smith.

Agents: Messrs. White and Sons.

Counsel for Respondents: Mr. Hawkins, Q.C.; Hon. E. Chandos Leigh; Mr. Anstie.

Agents: Messrs. Waterhouse and Winterbotham.

THE petition contained the usual allegations of bribery and treating, but did not pray the seat.

It was proved that corrupt treating had been committed by several persons who were undeniably agents of the Respondents, and the Respondents thereupon declined further to uphold the validity of the election.

In the course of the case,

Admissibility of evidence as to bribery by person who has absconded.

It was proved by the evidence of his brother Williams that one Edward Stephens had disappeared shortly after the election. It was alleged by the Petitioners that Edward Stephens had bribed several voters, and his brother William was asked questions with a view to show that he knew from what Edward had said to him that he had committed the alleged bribery.

Mr. *Hawkins*, for the Respondents, objected to William Stephens being asked such questions as these.

Mr. Baron BRAMWELL: "I would rather receive the evidence, and I will undertake to say that it shall not unduly bias me if it is not to be acted upon. If there is no better evidence of this alleged bribery than that he had said to his brother, 'I have bribed so and so,' I should not act upon it."

Adjournment of the Court in order that a witness may be compelled to attend.

Subsequently the father of Edward Stephens was called, and admitted that he knew his whereabouts, whereupon

Mr. Baron BRAMWELL said: "It is absurd to suppose that any Court would allow justice to be trifled with by the continued absence of witnesses. I would adjourn for six months if it were necessary for this witness to be called here."

Duties of the judge judicial not inquisitorial.

Stephens and the other witnesses did not appear at all, but at the close of the case, after the Respondents had declined to contest the seat any further, and before delivering judgment,

Mr. Baron BRAMWELL said further as to this: "I have been wondering whether I ought to compel the attendance of Stephens and the other men, or to order it—I will not say compel it. The statute * says 'compel.' There is not the least proof against any of them at present, and therefore I appeal to you, brother Ballantine, and Mr. Hawkins, to assist me, as the case is really over. I rather think that the meaning of this statute is, not that the judge should compel the attendance of any person with a view to the report he may make to the Speaker, but with a view to the true decision of the question between the Petitioner and the Respondent. If so it is not necessary to compel the attendance of these people, as that would be attended with this extreme inconvenience, that I should have to adjourn the Court for a week."

* Parl. El. Act, 1868, s. 32, is as follows:—"On the trial of an election petition under this Act the judge may, by order under his hand, *compel* the attendance of any person as a witness who appears to him to have been concerned in the election to which the petition refers, and any person refusing to obey such order shall be guilty of contempt of court. The judge may examine any witness so compelled to attend, or any person in court, although such witness is not called and examined by any party to the petition. After the examination of a witness as aforesaid by a judge, such witness may be cross-examined by or on behalf of the Petitioner and Respondent, or either of them."

Mr. *Hawkins:* "Mr. Justice Grove, at Wakefield,* stated that he thought it was no part of his duty to compel the attendance of witnesses, or to be sending for witnesses, or acting in an inquisitorial manner."

Mr. Baron BRAMWELL: "It is evident that I need not compel it on behalf of either party, because the statute says, 'after the examination of witnesses aforesaid by the judge, such witnesses may be cross-examined by or on behalf of the Petitioners and Respondents or either of them.' Therefore, the judge for his own views and objects, compels the attendance."

Mr. *Hawkins:* "At Wakefield, after witnesses had been called to disprove some of the acts of bribery alleged, one of the persons who was alleged to have bribed was called to contradict five or six witnesses, and he swore he did not bribe them. I submitted it was no part of my duty, inasmuch as the object of the petition was gained (the judge had already decided that the election was void) to be cross-examining witnesses for the mere purpose of discussing a question which was not material to the case before the judge; and the learned judge intimated that I was adopting the proper course, and he said as follows: 'It is no part of my duty to be investigating isolated cases; if the Legislature should think fit to direct inquiry they can do so, and there will be proper parties appointed to do it, but such an inquiry is not to be held at the expense either of the Petitioner or the Respondent. The object of the petition being gained, there is an end of the inquiry as far as the parties are concerned.' I therefore abstained from cross-examining the witnesses."

Mr. *Giffard:* "I am able to assist your Lordship with a case in point. Mr. Justice Willes, in the Windsor case,† made exactly the same observations—namely, that his duties were judicial, not inquisitorial; and if the judicial issue was determined by evidence before him, it was no part of his duty to enter into an inquiry as to the state of the borough."

Mr. Baron BRAMWELL: "You could not name a greater authority. That is my own notion too."

Mr. *Hawkins:* "The Petitioners will have a right to say that,

* Ante, p. 103.

† Vol. i. p. 6.

inasmuch as the petition is decided, there is so far an end of the matter."

Production of telegrams by the Post-office authorities.

Mr. Casserley, an officer in the General Post Office, was called upon a *subpœnâ duces tecum* to produce certain telegrams which had passed between two persons whose names were mentioned in the subpœna between two certain dates, but he refused to produce them without an order from the Court.

Mr. Baron BRAMWELL: "It is just as well that the matter should proceed technically."

Mr. *Giffard:* "I do not know whether your Lordship's attention has been called to the provision in the statute. I have asked the witness to produce the telegrams between A. L. Leonard and H. S. Leonard between January 27 and February 4."

Mr. Baron BRAMWELL (to the witness): "Do you object to produce them?"

A. "I do."

Mr. Baron BRAMWELL: "As at present advised, I will not make you."

The witness: "May I explain my objection?"

Mr. Baron BRAMWELL: "Your objection is that telegrams are of a confidential character, and the Post Office desire to keep the confidence unviolated."

The witness: "That is broadly so, but it is regulated by the interpretation put upon the two Acts of Parliament on the point. The Telegraph Act 1868 (31 & 32 Vict. c. 110), s. 20, enacts that 'any person having official duties connected with the Post Office, or acting on behalf of the Postmaster-General, who shall, contrary to his duties, disclose or in any way make known or intercept the contents, or any part of the contents, of any telegraphic message, or any message addressed to the Postmaster-General, shall be guilty of a misdemeanour.' The Act of 1869 (32 & 33 Vict. c. 73, s. 23) enacts that 'nothing in this Act contained shall have the effect of relieving any officer of the Post Office from any liability which would, but for the passing of this Act, have attached to a telegraph company or to any other company or person, to produce in any court of law, when duly required so to do, any such written or printed message or communication.'"

Mr. Baron BRAMWELL: "What do they mean by that?"

Witness: "I will not pretend to interpret this section, but the view the Post Office has taken of the section is this—that without the express direction of the Court, it is contrary to the duty of the Post Office or any of its officers to produce in Court any telegram that may be called for having reference to the public interest at large. Your Lordship may probably be aware that the question was raised in the recent case at Taunton?" *

Mr. Baron BRAMWELL: "I was not unacquainted with the decision before it was announced, because Mr. Justice Grove consulted my brother Mellor and myself about it."

The witness: "The difference between that case and this is that there they served a subpœna in general terms for the production of all telegrams sent to and from London during four months."

Mr. Baron BRAMWELL: "I have a strong impression that these documents are in the custody of her Majesty, and that you have no right to bring them here any more than a banker's clerk has a right to bring his master's ledger. I have a very strong notion to that effect."

Mr. *Giffard* submitted that the telegrams ought to be produced.

Mr. Baron BRAMWELL: "We must decide the matter technically. Do you ask him to produce the telegrams?"

Mr. *Giffard:* "I do."

Mr. Baron BRAMWELL (to the witness): "You are called upon to produce them. Do you produce them?"

Witness: "My instructions are not to produce them unless the Court directs me to do so. I must obey those directions."

Mr. Baron BRAMWELL: "Then you do not produce them?"

Witness: "I do not produce them."

Mr. Serjeant *Ballantine:* "Then I call upon your Lordship to order him to do so."

Mr. Baron BRAMWELL: "I decline to do so. I have dealt with it technically, and I have great doubts whether there is a power of compelling any person to produce them, for the reason I have

* Ante, p. 72.

named—namely, that they are in the custody of her Majesty; and I certainly have too much doubt about it to enforce it by the summary remedy of commitment for contempt for their non-production. I have little doubt that whoever drew that section * in the Act did intend that there should be some compulsion upon the Post Office authorities to produce the documents, but I am by no means sure that the proper means are used for doing it. The proper test is this, if you subpœna the Postmaster-General, he may say, 'I have not got them; they are in my possession as a servant of the Crown.' The matter is too doubtful for me to settle that question by the summary process of a committal for contempt, and more especially I am indisposed to do it because I really think that for the public good there ought to be no such power of compelling the production of these documents. It is the necessary consequence that persons who correspond by telegram are obliged to repose confidence in the Crown, and I believe it will be for the public good if it is found that that is a confidence that the Crown cannot be compelled to violate. Inconvenience might arise in many cases; it might arise in the case of a confidential communication between attorney and client, or husband and wife: therefore we must look to the general principle. I strongly incline to the opinion that it is for the good of the community that the necessary confidence of a sender of a telegram in the Post Office should not be violated. Therefore, taking that into account, and taking into account the doubt I have as to the power to compel the production, I will not enforce it by the summary proceeding of commitment for contempt of court. I should add to the remarks I have made that the Crown could always say, 'We think this ought to be produced, and we shall raise no objection to its production.'"

At the close of the Petitioners' case,

Mr. *Hawkins*, for the Respondents, stated that after the evidence which had been given of corrupt treating by agents, he would not further contest the seat. He asked leave to put the Respondents and several other persons in the witness-box to deny that they were in any way personally to blame in the matter.

* 32 & 33 Vict. c. 73, s. 23.

This having been done,

Mr. Baron BRAMWELL pronounced judgment, declaring that the Respondents were not duly elected, but exonerating them from any personal blame as to the treating.

Corrupt treating of illiterate and ignorant voters.

As to the treating he said: "I think it is very likely that Mr. Smith and the other people who got up these most unwise treats and entertainments did not know that what they were doing was contrary to law. The openness with which they did it was such as to exclude the notion that they thought that they were doing anything wrong. But I confess that I think it was very wrong. When we consider the character of the voters that were called here, the entire absence of education in all, and that they could neither read nor write, knowing nothing about the parties, except that one was blue and the other was yellow, it is impossible not to see that the treating and entertainment, whether it was a shilling or twopence, must have had the tendency to make people vote who otherwise would not have voted. Therefore, although I recognize the truth of Mr. Smith's statement, and believe that the people who were parties to these unwise and unlawful entertainments did not know that they were doing wrong, I think it was a very improper thing, and I very much wish that the consequences could reach them rather than the two gentlemen who are unseated by acts done utterly contrary to their own wishes and intentions. I do not like to recommend proceedings for penalties, but it might read a very useful lesson to some of those gentlemen if they were made to pay some of the penalties they have incurred under the Act* by this most improper treating."

Costs.

As to costs he said: "Although there is no guilty knowledge on the part of the Respondents in this case, I must order them to pay the costs, and for this reason, that the only way the judge has of getting at those who commit wrongful acts is to get at those whom the law has made responsible for those unlawful acts, and in this case it is the two Respondents. And when one comes to consider that it is a perfectly possible thing that these corrupt practices may have influenced the election, and that the

* Corrupt Practices Prevention Act, 1854, s. 4.

small temptation may have operated upon the small intelligences to which it was addressed, I think it is perfectly possible that the unsuccessful candidates may owe the loss of their return to these improper practices. I cannot, as I said before, blame the Respondents at all. I am satisfied they are perfectly innocent in the matter, and one cannot help being sorry for them. Perhaps they ought to have kept a sharper look-out upon what was going on. I am not going to insinuate what I do not say, that these things came to their knowledge, but it is very strange that they did not come to the knowledge of somebody whose duty it was to inquire into them and to report to these gentlemen. Be that as it may, I am of opinion that the Petitioners are in the right, and that the unsuccessful candidates have very properly suffered by these practices. The Respondents are responsible for them, and therefore I think that what one may call the ordinary consequences should follow—namely, that the Respondents in this case should pay the costs."

CASE XX.

BOROUGH OF DUDLEY.

BEFORE MR. JUSTICE GROVE, APRIL 28, 1874.

Petitioners: Benjamin Hingley and others.
Respondent: Henry Brinsley Sheridan.
Counsel for Petitioners: Mr. Powell, Q.C.; Mr. Jelf.
Agents: Messrs. Homfray and Holberton.
Counsel for Respondent: Mr. M'Intyre, Q.C.; Mr. Hodson.
Agents: Messrs. Harrisons.

THE petition* was as follows:—

1. "YOUR PETITIONERS, Benjamin Hingley and Edward Bowen, are persons who voted at the above election, and your Petitioners, Josiah Robinson and Thomas Foxall, are persons who had a right to vote at the above election.

2. "And your Petitioners state that the election was holden on the 4th day of February, in the year of our Lord 1874, when Henry Brinsley Sheridan, Esquire, and Frederick Smith Shenstone, Esquire, were candidates, and the Returning Officer has returned the said Henry Brinsley Sheridan, Esquire, as being duly elected.

* As to the wording of the petition, Mr. Justice Grove said, "The sole allegation in the petition, although it is conveyed in a vast number of words, is substantially that there was so much riot and intimidation by mobs that it was not a free election." Vide infra, p. 119.

3. "And your Petitioners say that before and during the hours of polling on the said 4th day of February large crowds, mobs, and organised bands of disorderly rioters, violent and dangerous persons in the interest and in favour of the said Henry Brinsley Sheridan, assembled and congregated near to, at, and around divers of the polling booths and polling stations appointed for taking the poll in the said Borough, and assaulted and beat and insulted, and seriously intimidated and physically obstructed and necessarily alarmed and put in bodily fear large numbers of voters entitled to vote in the said election, who might and would otherwise have voted for the said Frederick Smith Shenstone, and prevented large numbers of such voters from approaching the said polling booths and voting therein, and prevented and deterred a large proportion of the voters entitled to vote in the said election from exercising the franchise at all in the said election, and large numbers of persons who had the franchise were not at liberty, as they ought to have been, to go, and had not the means, as they ought to have had, of going to the poll and giving their votes without obstruction and without fear or intimidation.

4. "And your Petitioners say that while on the one hand large numbers of voters who wore the colours of the said Henry Brinsley Sheridan, and who were known to be supporters of the said Henry Brinsley Sheridan, were cheered and permitted and encouraged by the said crowds, mobs, and disorderly bands to approach—and did approach—the said polling booths and polling stations and voted therein; on the other hand, large numbers of voters who did not wear the colours of the said Henry Brinsley Sheridan, and who were known to be supporters of the said Frederick Smith Shenstone, were hooted, illtreated, hindered, abused, and threatened by the said crowds, mobs, and disorderly bands, and were by them prevented and deterred from approaching and could not approach the polling booths and polling stations, or vote therein, as they were entitled to do, and ought to have been allowed to do.

5. "And your Petitioners say that about midday, and subsequently on the said 4th day of February, a serious riot took place in the said Borough, and a mob of persons in favour of the said

Henry Brinsley Sheridan, and opposed to the said Frederick Smith Shenstone, entered the town of Dudley, and also the town of Brierley Hill, smashed the windows of many houses therein, and did very great damage, and such riots were only checked by the arrival of a troop of mounted artillery, who had been telegraphed for for that purpose, and that, as well by such riots as by the other disorderly proceedings in the previous paragraphs of this petition set forth, the inhabitants of the said Borough became and were greatly alarmed, and life and property was considered unsafe in the said Borough, and large numbers of persons entitled to vote, and who otherwise might and would have voted in the said election, were necessarily deterred from voting at the said election, insomuch that out of a constituency of fourteen thousand voters in the said Borough nearly five thousand voters did not vote at the said election.

6. "And your Petitioners say that about three o'clock in the afternoon of the said 4th day of February, the Mayor of Dudley, William Wilkinson, Esquire, being the Returning Officer for the said Borough, having before him police reports of the extreme intimidation and obstruction used by the said crowds, mobs, and disorderly bands, and of the unsafe and disorderly state of the Borough, and deeming life and property to be unsafe in the said Borough, adjourned the poll in certain districts of the said Borough, each of which contained several polling booths and polling stations, and himself read the Riot Act.

7. "And your Petitioners say that the said Returning Officer in so adjourning the poll in the said districts adjourned it from Wednesday the 4th until Saturday the 7th day of February.

8. "And your Petitioners say that the said Returning Officer then and there, that is, at about three o'clock in the afternoon of the said 4th day of February, publicly announced the said adjournment of the poll in the said districts from the 4th to the 7th of February at the Public Office of the said Borough.

9. "And your Petitioners say that the said Returning Officer immediately after so publicly announcing the said adjournment as aforesaid despatched written orders to the presiding officers at each polling booth and polling station within the said districts to adjourn accordingly, but in consequence of the prevailing

blockade and confusion none of such orders reached or could reach the said polling booths and polling stations respectively until after four o'clock p.m., when the poll at those booths and stations had already closed.

10. "And your Petitioners say that in consequence of the said public announcement of adjournment divers voters entitled to vote, and who otherwise might and would have voted in the said districts for the said Frederick Smith Shenstone, abstained from voting, and did not vote in the said districts.

11. "And your Petitioners say that on the next day, the 5th day of February, the said Returning Officer, disregarding his said announcement of adjournment served the agent of the said Frederick Smith Shenstone with a written notice that he should proceed with the counting of the votes, and should declare the poll on that day, the 5th day of February, and the said agent of the said Frederick Smith Shenstone protested against the said notice.

12. "And your Petitioners say that accordingly on the said 5th day of February the said Returning Officer caused the counting of the said votes to be proceeded with, and when it was completed the said agent of the said Frederick Smith Shenstone handed to the said Returning Officer the following written protest:—

"'Dudley Borough Election.

"'To THE RETURNING OFFICER,—

"'I, as agent of Mr. Frederick Smith Shenstone, protest against your making a declaration of the poll, as you had given public notice yesterday, previous to the close of the poll, of your having adjourned the poll until Saturday next, in consequence of the obstruction to, and intimidation of, Mr. Frederick Smith Shenstone's voters, and of the disorderly state of the Borough.

"'Dated the 5th day of February, 1874.

(Signed) "'JESTON HOMFRAY.'

13. "And your Petitioners say that the said Returning Officer nevertheless and notwithstanding, and in spite of the said protest,

to wit, on the said 5th day of February, declared the poll to be as follows:—

Sheridan . . .	5149
Shenstone . . .	4181
Majority for Sheridan . .	968

and he has returned the said Henry Brinsley Sheridan as being duly elected as aforesaid.

14. "And your Petitioners say that on the said 4th day of February it became, and was, as it still is, evident that the aforesaid riots and intimidation were so general as to influence the votes of the body of voters, and by reason of the premises freedom of election was violated at the said election, and that the numbers actually polled thereat did not, could not, and do not represent the real opinion and political feeling of the majority of the constituency, and that without an adjournment or a fresh election such real opinion and political feeling could not and cannot be ascertained.

"Wherefore your Petitioners pray that it may be determined that the said Henry Brinsley Sheridan, Esquire, was not duly elected or returned, and that the election was void."

In the course of the case,

A witness was asked by Mr. *Powell*, for the Petitioners, "Are you a paid canvasser?"

Evidence confined to allegations in petition.

Mr. Justice GROVE: "I do not see how this bears upon the question at issue. The sole allegation in the petition, although it is conveyed in a vast number of words, is substantially that there was so much riot and intimidation by mobs that there was not a free election. Upon what issue in the petition can it bear whether this man is a paid canvasser or not?"

The question was not pressed.

Mr. *M'Intyre*, in opening the Respondent's case, stated that he should call evidence to prove (1) that the account given of the

rioting was an exaggerated one, and (2) the rioting was caused as much by the partisans of the defeated candidate as by those of the Respondent.

Effect on election of riots caused by partisans of defeated candidate.

Mr. Justice GROVE at once said as to the Respondent's case:—"As to the proving that there was violence on the part of the supporters of the defeated candidate, I do not see how that can bear upon the case, unless it was substantial and formed a large part, as it were, of the proceedings, and unless Mr. M'Intyre can show that the defeated candidate is interested in this petition (that is to say, that it has been lodged at his instance, and with his privity), and that he is therefore seeking to take advantage of his own wrong. Suppose, for instance, a case in which one of the two candidates had obviously an entirely one-sided mob, we will presume for a moment on the Petitioner's side, then I think it might well be that the judge might say, 'No, I will not unseat the member who is innocent for the sake of a person who has done all he can, or whose agents have done all they can, to prevent that member being seated.' Nothing of that sort has as yet transpired from Mr. M'Intyre's cross-examination. All that I could gather from that was, that there was some extent of it. I have a duty not only to these two parties, but to the voters, to the public generally, to see that the franchise can be fairly exercised. Of course, one would not set aside an election for any trifling disturbance which may take place, as it sometimes does, good naturedly, at an election, without any real hindrance or impediment to the voting. What I have to look at is whether there was such a substantial riot and tumult as prevented any large number of the electors from voting."

After several witnesses had been called for the Respondent,

Mr. Justice GROVE said as follows:—"I will assume that there was a great deal of blame on each side without expressing any opinion as to the conduct of the respective candidates, and my impression from the evidence is that the mob on the Respondent's side was much the most powerful, not perhaps because there were more things done to instigate it, but because he had the larger number of supporters on his side. Assuming the facts to be so, and assuming also that there was such a state of

things as really placed the whole town in a state in which reasonable men, who were not very zealous partisans, or men of extraordinary courage, had not a fair opportunity of voting, it is clearly laid down in the cases* that, quite irrespective of any agency on the part of the candidates, intimidation that prevents free voting avoids an election. An election is supposed to be the voluntary voting of the people, and if the state of the things in the town is such that that cannot be properly exercised, there cannot be said to be an election."

Mr. *M'Intyre* then stated that after his Lordship's expression of opinion he should not press the Respondent's case any further.

Mr. Justice GROVE, in his judgment declared the election void at common law on the ground of rioting, and said as follows:—

"Having expressed my opinion as to the law bearing on this case during the course of it, and having referred to the opinions of the learned judges, Mr. Baron MARTIN† and Mr. Justice BLACKBURN,‡ I think it unnecessary to go into the evidence in detail. Assuming, as indeed I am satisfied, that the rioting and assaults were not committed by mobs acting for one side only, and that the more formidable violence on the part of the mob which espoused the Respondent's side, was not due to any greater exertions by his immediate partisans, but was rather due to the fact that he had a much larger number of supporters among the class by which the riots and assaults were committed, I am of opinion that the tumultuous assemblages gathered together, and the acts of extreme violence committed at the polling places were such as were calculated to intimidate and deter, and did intimidate and deter a large number of voters from exercising the franchise, and that very many voters were actually prevented from exercising it, that the election was not a free one, and that the constituency had not a fair opportunity of freely exercising the franchise, therefore this election is void. I by no means say that if a case had been made out of the violence

* Staleybridge, vol. i. p. 72; Nottingham, *ib.* 246; Longford, ante, p. 12.

† Nottingham, vol. i. p. 246. ‡ Staleybridge, vol. i. p. 72.

being wholly or substantially on the side of the defeated candidate, and if I was satisfied that the result of the poll was a fair expression of the opinion of the constituency, I should have come to this conclusion, but the case, taking it in the most favourable view for the Respondent, stops far short of this."

As to costs he said:

Costs. "I have no evidence to show that the candidates themselves promoted these riots, but men were employed by the supporters of both candidates of a character which, so far from being likely to prevent breaches of the peace, was much more likely to encourage them. Considering therefore that there is blame on those who were acting for both sides, I decide that each party pay their own costs."

CASE XXI.

BOROUGH OF POOLE.

BEFORE MR. JUSTICE GROVE, MAY 4, 1874.

Petitioners: 1st Petition, Charles Hurdle and Henry Stark; 2nd Petition, Hiram Young and John Rennison.

Respondent: Mr. Charles Waring.

Counsel for Petitioners: Mr. Hardinge Giffard, Q.C.; Mr. W. G. Harrison.

Agents: Messrs. Ellis and Co.

Counsel for Respondents: Mr. Serjeant Ballantine; Mr. M'Intyre, Q.C.; Mr. Bowen.

Agents: Messrs. Cope, Rose, and Co.

THE first petition contained the usual allegations of bribery, treating, undue influence, and personation by the Respondent and his agents, but did not pray the seat.

The second petition, in addition to the usual allegations of corrupt practices by the Respondent and his agents, alleged "that general bribery, treating, and undue influence were practised before, at, and after the said election by divers persons, and that by reason thereof the election and return were and are wholly null and void."

8. "That after the said election and return, and within 28 days before the presentation of this petition, divers payments of money were made by the said Charles Waring, by himself and by others, with his privity and on his account, in pursuance and in furtherance of the corrupt practices hereinafter alleged, to divers voters and other persons and to persons on behalf of voters.

9. "That after the said election and return, and within 28 days before the presentation of this petition, that is to say, on the 27th day of February, 1874, payment of money was made by Horatio Hamilton with the privity or on account of the said Charles Waring, the Respondent, to Sophia Matthews on account of James Matthews, a voter at the said election, and to divers voters, and persons on account of voters, at the said election, in pursuance and furtherance of the corrupt practices hereinbefore alleged, that is to say, the offer or promise made by an agent or agents of the Respondent to the said James Matthews and to the said other voters to give or promise the said payment of money to or for the said James Matthews and the said other voters, or some other payment of money to or for the said James Matthews, and the said other voters respectively, or on his or their behalf, in order to induce the said James Matthews and the said other voters to vote or refrain from voting at the said election."

And the petition prayed that the election might be declared void.

The charge of personal bribery entirely failed, as also did several cases of bribery by agent. But one case of bribery by agent was proved, and it was also proved that corrupt treating had been committed by several other persons whose agency was not disputed.

The two petitions were heard together.

In the course of the case,

Corrupt treating after the close of the poll.

It was proved that at the previous election in 1868 the election agent returned £479 as the election expenses of the Respondent, but that after he had made this return further bills were sent in, amounting to £1,360. These bills he paid, but he did not make any fresh return of election expenses. Some of these bills were for drink and refreshments supplied before, during, and after the election. It was also proved that shortly after this election bills were sent in to the Respondent by a number of publicans for beer given away after the election was over; it was admitted that this beer had been ordered by the Respondent's agents, but it was argued that there was nothing to show that the giving away of this beer was corrupt treating within the meaning of the Corrupt Practices Act 1854, s. 4.

Mr. Justice GROVE, in his judgment, said as to this as follows: "It may be said as to the election in 1868 that the Respondent's agent was not aware that any further claims were going to be made against him when he made out his account of the election expenses, but that, finding the people expected to be paid for the beer and refreshments supplied, he had (from what may be called a sense of honour) paid the bills when they were sent in. If so, he should have taken the utmost pains to prevent the recurrence of such a thing at a future election. But I cannot find that anything was done to prevent it, and apparently in some way or other the publicans became advised of what they considered to be the law, viz., that although you may not give away beer or treat *during* the election you may treat as much as you please after the election is over; and, moreover, they seemed to have perfectly understood that they might make up their minds that such would be the mode of acting. It is a curious coincidence that they should all of them have suddenly acquired this view of the law, and that they should all have dated their bills the day after the election. Some of them sent in their bills for an amount of beer which, if it was really consumed in one or two days, would have been most extraordinary. That a man, for instance, renting a house at £16 a year should in one or two days give away £20 worth of beer, it seems to me to require a high degree of credulity to induce one to believe that that was a perfectly straightforward matter, and that it was merely an innocent treat of a spontaneous nature, which arose after the election was concluded. No doubt it was decided in the Brecon case * that a genuine rejoicing festival spontaneously given without any preconceived idea might not be a payment for having voted, yet we must consider each case with reference to its attendant circumstances to see whether there was not (although not expressed in terms) a tolerably clear understanding not only that those people were to have a very considerable amount of beer to give away after the election, but also that their proceedings would not be scrutinised too closely, provided only that they sent in their bills after the election. It is a curious thing that my brother Lush, in his

* Ante, p. 43.

judgment in the Brecon case, seems to anticipate this very case, for after deciding that Mrs. Gwyn Holford's alleged treating for such a purpose might imperil a future election, where it was desired to influence the votes, he goes on to say: 'Nor can it be the merely giving an entertainment as an expression of gratitude, or by way of rewarding the voters. So to hold would be to give no meaning to the word "corruptly," for the Act says that the offence shall consist, not in the mere giving meat, drink, &c., to a voter "on account of his having voted," but the doing so corruptly on account of his having voted. And this agrees with the 5 & 6 Vict. c. 102, s. 22, which was repealed by the Corrupt Practices Act, 1854, the language of which was, not rewarding merely, but *corruptly* rewarding such person for having voted. I am, therefore, driven to the conclusion that the treating which the Act calls corrupt as regards a bygone election must be connected with something which preceded the election, must be the complement of something done or existing before and calculated to influence the voter while the vote was in his power. An invitation given before to an entertainment to take place afterwards, or even a promise to invite, or a practice of giving entertainments after an election, which it may be supposed the voters would calculate on, would, if followed up by the treat afterwards, give to it the character of corrupt treating.' This is almost literally expressing in words what appears to have taken place in this case, that is to say, a practice of giving entertainments after an election, which would be corrupt treating if it can be supposed that the voters had been induced by promises to calculate upon such an entertainment being given. Here at a previous election there had been a paying of persons for beer connected with an election, and there has obviously been an expectation in the minds of the publicans of the borough who supported the Respondent that there would be large bills allowed and paid if they sent the bills in afterwards, and then (what perhaps is the strangest of all) when those bills were sent into the Respondent's agent he does not send them back, or repudiate them; he merely keeps them without a word of remonstrance. Can any rational mind doubt that after this trial was over, if the sitting member had been declared to have been duly elected, every one of those bills would

have been paid? What is the object of keeping them? Why was there no remonstrance or repudiation? What can one suppose, viewing human affairs with every reasonable amount of charity, but that every one of those bills would have been paid, and so the matter would have gone on, *toties quoties?* Can it be said that this large extent of treating was all a sudden, spontaneous idea, as in the Brecon case, where an entertainment was given merely as a spontaneous rejoicing, never having been thought of before by either one party or the other? To my mind it seems impossible that a rational intellect could come to such a conclusion. And if it were not so, what would be the consequences? Why, that at every future election for this borough there would be an understanding which would virtually amount to a certainty that as soon as the polling day was over, there would be an enormous quantity of beer distributed, and the amount which the publicans gave away before or after the election would never be enquired or looked into. The broad and obvious state of this whole matter is that it was expected, and I think I may say understood, though not expressed in absolute words, that a large sum of money would be paid for beer, that a large amount of beer was ordered by an agent of the Respondent immediately after the election day had passed, and that that was so immediate and followed the election in such a way that it would be impossible to say that it was a mere spontaneous rejoicing, and not in any way connected with what had gone before. By these considerations, I am led reluctantly to consider that there was treating at the recent election, and that that treating was sufficiently connected with the election in 1868 (agreeing entirely with what my brother Lush has said in the Brecon case) to make it corrupt, as the word is applied by all the learned judges—namely, that it was intended to produce an influence on the vote, or to reward the voter for having voted."

Mr. Justice GROVE, in his judgment, declared the election void on the ground of corrupt treating.

As to costs, he said: "I am by no means satisfied with the mode in which this case has been brought forward. One of the petitions is only a supplementary petition, filed after the first one Costs.

to meet some difficulty which occurred as to the time at which the first petition was presented. Of the two petitioners in the first petition one is a marksman, and it may be assumed that he cannot write his name, and the other writes his name in a thoroughly uneducated hand, which shows that it was as much as he could manage to scrawl his name. What meaning can be attached to that except that those who are really interested in this matter put forward persons who cannot pay any costs beyond the amount of money which they are supposed to have deposited, but which in all probability has been deposited for them, nevertheless if they succeed, they expect to get costs out of the Respondent. The general course in these cases is no doubt to give costs to the successful party, but I shall not do so on this occasion. When a defeated candidate comes forward in a straightforward way and succeeds in an election petition, as a general rule I should do as I have done in other cases, that is to say, let the costs follow the event. But here persons appear to have been put forward who may receive costs, but who cannot pay them. I have had no evidence before me to show that this marksman and this other illiterate person came forward here for purely constitutional reasons to purify the electoral franchise of the borough, and, notwithstanding the challenge of my brother Ballantine, they have not been called to show that they have not been set up by other people. On these grounds, I must say that I do not approve of this petition. If I had thought that everybody had been straightforward, I should have given costs against the Respondent, but here, taking these circumstances into consideration, and taking also into consideration that many of the charges have failed, and that it is impossible not to see that this petition was to some extent what I may call a fishing petition, I shall order that each party pay their own costs."

CASE XXII.

BOROUGH OF LAUNCESTON.

BEFORE MR. JUSTICE MELLOR, MAY 4, 1874.

Petitioner: Herbert Charles Drinkwater.

Respondent: James Henry Deakin.

Counsel for Petitioner: Mr. Leresche ; Mr. Bompas.

Agent: Mr. J. Gurney.

Counsel for Respondent: Mr. Serjeant Parry ; Mr. T. N. Edwards.

Agents: Messrs. Peacock and Goddard.

THE petition contained the usual allegations of corrupt practices, and further alleged,—

4. "That many persons voted at the said election, and were reckoned on the poll for the Respondent who were before, during, and after the election bribed, treated, and unduly influenced, and that the votes of such persons were null and void, and ought now to be struck off the poll.

6. "That the Respondent having for the purposes of influencing voters at the election given to certain voters in the said Borough immediately before and at the said election a right to trap and shoot rabbits, was guilty of corrupt practice, and was disqualified from being a candidate for the said Borough, and that all votes given for him after due notice of such disqualification would be thrown away."

It was proved that in the course of 1872 the Respondent, a

gentleman of fortune in Lancashire, heard that the Werrington Park estate was in the market. It appeared that among other advantages held out to the purchaser was the influence which it would give him in the return of a member for the Borough; the Respondent purchased the estate as an investment, but that was among the temptations held out to a purchaser. The purchase was agreed to at the end of 1871, and about Lady Day, 1872, the Respondent took possession. At that time nothing particular transpired, but later on he came again, bringing with him two gamekeepers, and in presence of Paver, his land agent, he made enquiry as to the state of the game upon the estate, and he was then told by one of the keepers that there were too many rabbits. The Respondent then and there expressed a determination that the rabbits should be kept down, and said he would not permit his tenants to suffer in consequence of an excess of rabbits or game. When the Respondent bought the estate the farms were let under yearly agreements, subject to be put an end to by six months notice to quit, and in each agreement there was an absolute reservation of all game, fish, and wild fowl to the owner of the estate, and to any persons whom he chose to permit to sport. This was the state of things when the Respondent came into possession of the estate, and it so continued; except in two instances, no steps were taken to give notice to the tenants, or by the tenants to give notice to the landlord. Very soon, however complaints began to be made by the tenants of injury done by rabbits, and these complaints became so frequently repeated, that the Respondent gave orders that a trapper should be engaged, and proper steps taken to diminish the number of rabbits. Notwithstanding the engagement of this trapper the rabbits continued to do damage, and as late as December 5, 1873, the Respondent's agent, after holding a rent audit, wrote to the Respondent as follows: "The only discordant element at the audit was the rabbit damage." Such was the state of things when towards the close of January, 1874, an immediate dissolution of Parliament was suddenly announced. It appeared that the Respondent had six months before this time stated his intention, whenever a dissolution should occur, of standing for this borough. Accordingly the Respondent now offered himself

as a candidate in the Conservative interest, the present Petitioner standing on the Liberal side. On Thursday, January 29, the Respondent issued his address to the electors, in that address he referred to various topics, but did not mention or allude in any way to the subject of game or the game laws. After issuing his address the Respondent attended a meeting on this Thursday evening, and he then went through the various topics to which he had referred in his address. But before the meeting was over there came a mob of people who attempted to get up a considerable uproar by shouting out "Rabbits," and exhibiting a rabbit skin upon a pole, and reading out a handbill in which the Petitioner was praised and the Respondent disparaged. Among other things in that handbill there were allusions to the game question. Upon this uproar arising the Respondent came forward and said, referring to the handbill, "As to the matter of rabbits, on which question my opponent is trying to make capital against me, I tell you I am anxious that every rabbit in the neighbourhood should be destroyed, and am taking every step to destroy them, and am now employing more trappers for that purpose (loud cheers), and shall be glad for any of my friends to have them when they are shot."

The next night (Friday) the Respondent attended another meeting at St. Stephen's, a place where he owns a good deal of property. At that meeting a large number of his tenants were present, and he said with regard to this rabbit question as follows: "I give authority for you, every one of you, to kill every rabbit upon my estate; kill them, ferret them, shoot them, trap them, do whatever you like, send them to market, do whatever you will, I shall consider it a great comfort if you come to me next month, and say to me you have killed every rabbit on the estate." On the same evening after the meeting was over and the Respondent had gone away, Mr. Cowland, his agent, made a speech to the electors, in which he said, "I don't think that a single question of difficulty now remains between you and him (meaning the Respondent), especially now that the little four-legged question has been got rid of." These speeches of the Respondent and his agent, Mr. Cowland were published the next morning (Saturday) in a local

newspaper in a leading article of which the following paragraph appeared: "There is very little doubt as to the triumphant return of Colonel Deakin, who is beyond all comparison the more popular candidate of the two, and we venture to say that the majority of those who are now opposing him feel that for the town Colonel Deakin is by far the better man to be elected. As a landlord he has rendered himself highly popular by the kindest consideration for the interests of his tenants. He has most handsomely removed the rabbit difficulty out of the way."

As soon as this number of the local paper appeared, the Respondent's agents ordered a thousand extra copies of it to be printed and circulated gratis among the townspeople. On this same Saturday after that paper had been circulated in the Borough there was another meeting, at which, after discussions about a variety of political questions, the rabbit question was alluded to, and a Mr. Frost, an agent of the Respondent, repeated what the Respondent had said on the subject at the meeting at St. Stephen's on the previous evening.

Mr. Justice MELLOR, in his judgment, having recapitulated the facts above stated, said:—

"The whole validity of the late election turns upon the question whether the concession or declaration made at the various meetings during the election, and just before the poll, by the Respondent, did or did not amount, under the circumstances, to a corrupt practice within the meaning of the Corrupt Practices Act, or to a corrupt practice or an act of bribery at common law. I am satisfied that what passed at those meetings was done for the purpose of influencing in some way the election then about to take place."

After a further review of the evidence he added:—"I cannot help saying that what was done was done not so much from an abstract sense of justice as from a desire to influence the election. Having come to that conclusion the question then is, whether the statements, made as they were at a meeting composed very much of the tenants of the Respondent, amount to an offer or promise which comes within the meaning of this Act. The word 'corruptly' has been several times under the consideration of the judges, and, as far as I know, they are all agreed upon its

meaning; and my brother BLACKBURN, certainly on two occasions,* has laid down the law in reference to it in terms which are exceedingly clear. He said in the Hereford case,† 'what is the exact meaning of the word "corruptly?" (that was upon the 4th section of the Act), it means contrary to the intention of the Act, with a motive or an intention by means of it to produce an effect upon the election, not going so far as bribery, but going so far as to produce an effect upon the election.' Now where the motive is a bonâ fide one of giving a privilege to a tenant, where the landlord expects nothing in return, and to exercise no influence upon his tenants' conduct, that question does not arise, but where the motive is to produce an effect upon the election, then I think the offer, if it be an offer within the meaning of the section, made to voters, comes by force of that meaning to be within the definition of the section an offer made, and made to influence by the means I have already pointed out. But then comes the question whether or not this is a valuable consideration. I cannot help thinking it is a consideration which is valuable and appreciable, and that being so, I am bound to come to the conclusion that this was a corrupt act done by the Respondent himself. I cannot go into any intention of the Respondent, I must be governed by what he said and what he did, and by the inferences I ought to draw therefrom."

Mr. Justice MELLOR, in his judgment, declared the election void.

The scrutiny was then proceeded with, and ultimately the question as to the claim of the seat by the Petitioner was reserved for the Court of Common Pleas.‡

Costs followed the event. Costs.

* *Semble*, Wallingford, Vol. I. 59, and Hereford, ib. 195.

† Vol. I. 195.

‡ The case is reported in Drinkwater *v.* Deakin, L. R. 9 C. P. 626.

CASE XXIII.

BOROUGH OF DURHAM.

BEFORE MR. BARON BRAMWELL, MAY 19, 1874.

Petitioners: James and Another.

Respondents: Mr. Charles Thompson and Mr. John Henderson.

Counsel for Petitioners: Mr. Serjeant Ballantine; Mr. Giffard, Q.C.; Mr. A. L. Smith.

Agent: Mr. J. Crowdy.

Counsel for Respondents: Mr. Charles Russell, Q.C.; Mr. Greenhow; Mr. McKellar.

Agent: Mr. W. Ford.

THE petition contained the usual allegations of corrupt practices, and did not pray the seat.

Several cases of bribery by agent were proved.

In the course of the case,—

Furnishing copies of election accounts filed under 26 Vict. c. 29, s. 4.

The returning officer was called to produce the bills and vouchers relating to the election expenses which had been sent in to him pursuant to the requirements of 26 Vict. c. 29, s. 4. After producing them,—

Mr. *Russell*, for the Respondents, said: "We have no objection to copies being furnished or taken of them. I think it right to say that the Returning Officer is only bound and only entitled

under the Act* to allow inspection of the accounts, but not to allow copies to be taken. I do not know whether that is the right view or not, but it has been acted upon.

Mr. Baron BRAMWELL:—"The Act of Parliament does not compel them to allow copies to be taken, but whether it prevents them doing that I do not know. I suppose you have no objection to their taking copies?"

Witness:—"I have no objection to anything your lordship requires."

Mr. Baron BRAMWELL:—"I should think there is no objection to the Petitioners being allowed to take copies. My notion is that though not compellable to permit copies to be taken the returning officer had better let both parties have copies."

Employment of "runners."

It was proved that a number of men were employed by the Respondent's agents to act at the time of the election as "runners." Their duties were to carry notes and messages from one part of the Borough to another, and it appeared that it had been the custom to employ "runners" at many previous elections. But few of these runners were voters themselves, but a very large number of voters had children or relations employed as such.

Mr. Baron BRAMWELL said in his judgment as to these runners as follows:—

"We have seen from the very candid evidence of Mr. Granger [a solicitor and one of the Respondent's principal agents] that these runners were not wanted for the work they professedly had to do, but were appointed, many of them, for other purposes and other considerations. It is admitted also that there were a very large number of voters who had children or relatives employed, and we hear two instances of two children being professedly employed, neither of whom did any work. When we consider what sub-

* 26 Vict. c. 29, s. 4, is as follows:—"A detailed statement of all election expenses incurred by or on behalf of any candidate shall within two months after the election be made out and signed by the agent, . . . and delivered, with the bills and vouchers relative thereto, to the returning officer . . . . and the said returning officer shall preserve all such bills and vouchers, and during six months after they have been delivered to him, permit any voter to inspect the same on payment of the fee of one shilling."

ordinate persons were employed, and the indiscriminate and careless way in which they were selected, one cannot help seeing that this was a very great means of corruption. Where, however, a gentleman like Mr. Peele* says that in his judgment these runners are necessary (in a sort of fashion apparently peculiar to the city of Durham for anything I can see), and that their numbers were not excessive, one hesitates very much to trust to the dictates of common sense in the matter, and to decide against them. If the case had turned upon this only I confess I should have been most reluctant to say that there had been corrupt practices or bribery in the employment of these runners, but if I might venture to give a warning word to the City of Durham and to those who may endeavour to be its representatives at some future time, it would be to caution them most strenuously against the repetition of this practice, for it is impossible not to see that it may be held to be a corrupt proceeding."

What sufficient to prove agency.

It was proved that a voter was bribed by one Dawson, but Dawson's agency was disputed by the Respondents.

Mr. Baron BRAMWELL, in his judgment, said as to this:— "The question is, was Dawson an agent? I am of opinion that he was. It is not necessary in the nature of things that candidates should have an agent at all. They might, for anything I know, be able to get on without one, and in the last Taunton case I rather think that it appeared that some arrangement had been made by which nobody should be an agent. However, in this case it cannot be pretended that it was so. I cannot see how anybody could be more an agent than Mr. Dawson was, except that what he did was limited to a district, whereas the general agents might be more extensively employed than that. Mr. Dawson attended the Respondent's committee, he said he was there as many as twenty times. He was also present at the local committee, and on the day on which he bribed the voter he was busy in getting up voters who required particular attention. I should, for my own part, have thought

* Mr. Peele had been a chapter clerk in the employ of the dean for forty years, and had had great experience in election matters in previous elections, but had nothing to do with the present election.

that that was of itself enough if he was to use anything like solicitation or persuasion to them. If he was merely a person to take cabs to them, and had no authority to influence them at all, then possibly he might not be such an agent that a bribe by him would bind the Respondents. But he was, as I understand, a person who it had been arranged should on that day get the attendance of the voters, that is to say, use his influence and persuasion to bring them up, and in the course of doing that he unfortunately gave this bribe."

Mr. Baron BRAMWELL, in his judgment, declared the election void on account of corrupt practices by agent.

Employment of voters.

As to the employment of voters, he said:—"Great complaint has been made of the employment of voters, not actually as canvassers, but to accompany the canvassers. It is a very remarkable thing that so large a number of voters should have been employed, and that the receipts of the voters who were so employed should have been so much more considerable than the receipts of persons employed in a similar capacity who were not voters, and it is impossible to shut one's eyes to the fact that that may be made the means of very extensive and very efficacious bribery. It is impossible to suppose that people cannot be found fit to do those duties who have not a vote, and I should strongly recommend that in future such persons should be found, or that if they cannot be found the thing be left undone, because it may no doubt be made a system, and those who do it cannot have a doubt that it is made to a certain extent the means of influencing voters, at all events to this extent, that though there were good blues on the one hand, or good reds on the other, if they had not had this employment they might have turned from blue to red, or from red to blue, as the case may be. Therefore, if it is only done to secure them, it is of a mischievous character, because it is having an influence on their minds which it ought not to have."

Costs.

Costs followed the event.

CASE XXIV.

BOROUGH OF BOLTON.

BEFORE MR. JUSTICE MELLOR, MAY 22, 1874.

Petitioners: Ormerod and others.

Respondent: John Kynaston Cross.

Counsel for Petitioners: Mr. Herschell, Q.C.; Mr. Leresche; Mr. Edge.

Agent: Mr. T. W. Goldring.

Counsel for Respondent: Mr. Charles Russell, Q.C.; Mr. Edwards.

Agents: Messrs. Chester & Co.

THE petition contained the usual allegations of corrupt practices, an allegation that the Respondent did by himself and his agents, and other persons on his behalf, for the purpose of unduly and unfairly influencing the election and procuring the return of the Respondent thereat, unlawfully conspire with and did designedly, illegally, and corruptly induce divers persons in attendance at divers polling stations at the said election, and whose duty it was by law to maintain and aid in maintaining the secrecy of the voting in such stations, and who had made or had hereafter to make the statutory declaration of secrecy in that behalf, to wilfully, deliberately, and of purpose violate the provisions of the Ballot Act, 1872, and to unlawfully communicate to them, the said John Kynaston Cross and his agents, and other persons on his behalf, before the poll was closed information as to the name and numbers on the register of voters of certain electors who had and had not applied for ballot-papers, and voted at said polling stations; and a fifth allegation that the Respondent did by himself, his agents, and other persons on his behalf,

for the purpose of unduly and unfairly influencing the said election, and of procuring the return of the said John Kynaston Cross thereat, knowingly, deliberately, and of purpose contrary to law, pay and engage to pay money for and on account of the conveyance of voters to the poll; and it prayed that the election might be declared void.

The evidence given in support of the petition failed to establish a case.

In the course of the case,

Production of original telegram after its contents are known.

Mr. Casserley, a Post Office official, was called by Mr. Herschell, for the Petitioners, and asked to produce the original telegram sent from the Reform Club, Bolton, to Sheffield, on February 3rd, at 2·19 P.M.

Witness: "For the present I decline to produce it. I wish to submit the facts to the Court. The Post Office has had on previous occasions to deal with two classes of cases: the first class is that of actions between two parties who are parties to the telegram; if one of these parties requests the production of the telegram for his own interest the Post Office produces it. The second class has been where, as in this case, third parties have called for the production either of a whole class of telegrams or of some species of telegram, to be used as evidence against the sender, the receiver of them not being a consenting party to their production, nor in fact being concerned in any way in the question at issue. But in this case I find that the receiver has been called as a witness, and consequently this is a case which differs from both the cases I have mentioned, and I am anxious not to do anything on my own responsibility which the Postmaster-General might think exceeded the previous cases."

Mr. *Herschell* stated that in this case the question was whether, the telegram which had been received having been produced by the receiver, the original document, which was in the custody of the Post Office, could not be called for in order to ascertain who sent it. He submitted that there should be a means of compelling the production of the original of a message, and that in the case, for instance, of a false message to the Stock Exchange for the

purpose of affecting the condition of the funds, it would be essential that the original should be produced."

Mr. Justice MELLOR: "What was the case at Stroud?" *

Witness: "That case came to this:—Telegrams from A. to B. between certain specified dates, and particularly those on certain indicated dates, were called for. I objected to produce them without the order of the Court, and Baron Bramwell declined to make any such order. If this case had been of an exactly similar kind—if, that is, there had been an objection on the part both of the sender and receiver to the production of the telegram,—I should have followed the same course; but this is a third case, which upon my own responsibility I cannot possibly solve. I therefore am anxious to follow your Lordship's directions, rather than do anything voluntarily."

Mr. Justice MELLOR stated that he would consult Mr. Baron Bramwell upon the point before giving his decision.

Upon the following day he said as follows:—

"I have consulted my brother Bramwell upon the question of producing the original telegram, and he entirely agrees with me. He adopts the view which was suggested by Mr. Herschell—namely, that it would be of very serious consequence if we were to hold that, the contents of the telegram already having been disclosed, we would withhold the original when it was required for the purpose of tracing the act of an individual, and in criminal cases it would involve the greatest difficulty if we were to throw any doubt upon the propriety of its production. We think these considerations are paramount, and I must therefore request the gentleman who has the custody of the telegram to produce it for the purpose of its being identified, if you have the means of identifying it."

The original telegram was then produced.

Canvass-book how far evidence of agency.

Upon a canvass-book being called for by the counsel for the Petitioners,

Mr. Justice MELLOR said: "The fact of a man having a canvass-book is only a step in the evidence that he is a canvasser authorised by candidates' agents. I see no reason why you should

* Ante, p. 110.

not ask for the canvass-book, and if they give it you, you will see who is the canvasser, and then you may call that person and ask him by whose authority he canvassed those votes. Of course the production of the canvass-books proves nothing, except that certain ticks appear on it. If you want to go further, call the canvasser, because the mere fact of a man having a canvass-book and canvassing cannot affect the principal, unless I know by whom the man was employed. There is nothing more difficult or more delicate than the question of agency, but if there be evidence which might satisfy a judge, and if he be conscientiously satisfied that the man was employed to canvass, then it must be held that his acts bind his principal."

Mr. *Leresche* called attention to the Staleybridge case,* where there was volunteer canvassing.

Mr. Justice MELLOR: "I should not, as at present advised, hold that the acts of a man who was known to be a volunteer canvasser, without any authority from the candidate or any of his agents, bound the principal. You must show me various things, you must show me that he was in company with one of the principal agents, who saw him canvassing, or was present when he was canvassing, or that in the committee-room he was in the presence of somebody or other acting as a man would act who was authorised to act. If, putting all these things together, you satisfied me that the man was a canvasser with the authority of the candidate's agents, then I do not look with nicety at the precise steps, but there must be something of that character."

Effect on election of deliberate violation of the Ballot Act.

It was proved that on the polling-day the returning officer visited the various polling stations in company with the Town Clerk. At each of the polling stations he remarked that the personation agents for the Respondent Cross were furnished with a register of the voters to which tickets were attached opposite the name of each voter. As soon as a voter had voted the agent stealthily tore off the ticket and put it in his pocket, and subsequently conveyed it to some person outside the polling station, and by this means persons outside knew, while

* Vol. i. p. 66.

the poll was going on, who had voted and who had not voted. After calling the attention of the Town Clerk to what he had observed, the returning officer communicated with Mr. Winder, the Respondent's agent, who on the night before the election, upon hearing that something of the kind was contemplated, had expressly forbidden it to be done. Mr. Winder immediately wrote to each of the personation agents to request them to desist from what they were doing, and the returning officer observed, on again visiting the various polling stations, that some of the agents had desisted, but some had not. The returning officer subsequently communicated what he had observed to the Home Secretary.

It was submitted by the Petitioners that this proceeding was a deliberate and wilful violation of the provisions of the Ballot Act, and that in consequence the election ought to be declared void.

Mr. Justice MELLOR, in his judgment, said as to this: "There is no doubt that the Legislature, when it passed the Ballot Act, did intend that that should be a perfectly secret mode of voting, as far as any instrumentality or machinery which it could provide could make it so. It was new in the English law, it was new in the law of elections, nothing of the kind had occurred before; and therefore when the Legislature for the first time enacted that voting should take place by ballot, and prescribed in very careful language and terms, so far as they could, the precise machinery by which it should be carried into effect, they did intend that secrecy should be preserved as far as it was possible. But when the Legislature was for the first time creating the machinery of voting by ballot, (and there was no then-existing machinery which this could supplement, it was entirely new in its principle and entirely new in its machinery) it was for the legislature to provide the safeguards by which that secrecy should be protected and maintained, and if the Legislature have failed in doing that, the misfortune may be the misfortune of the public, but the fault at all events lies at the door of the Legislature. Now I am satisfied upon the construction of the Ballot Act that a deliberate violation of the provision with regard to secrecy was attempted to be effected in this borough. I am certain that those persons who placed these

tickets upon the register which were seen by the Mayor to be stealthily put into the pocket of the personation agent and conveyed by him manifestly to some persons outside, committed a violation of the statutory declaration which they had made, and committed an offence within the meaning of the provisions of the Ballot Act, thereby rendering themselves liable to serious punishment. But that is the only protection which the Legislature has provided. They undoubtedly thought that that would be abundantly sufficient to secure the secrecy of the election. If it has failed to do so, it is because it is not possible for any machinery to be invented which shall secure perfectly the object which the Legislature had in view. There is almost always a door left open to persons who are willing (as Mr. Leresche has very pertinently said) to run the risk of undergoing any amount of punishment, provided they can only benefit their party in an election. As a rule, however, I do not think that will often happen, and I do not think it would have happened here if the parties themselves had thoroughly understood the serious consequences which were likely to follow from it. However, it is clear that it was deliberately done, because when Mr. Winder found that it was proposed to be done he remonstrated and protested against it, warning them that it was contrary to the provisions of the Ballot Act, and therefore placing them in the condition of transgressing the law intentionally. But, as it seems to me, no foundation for attacking the seat can arise from the act of the personation agent, or any other officer connected with the election. The punishment is specified by the Legislature; it must be found within the four corners of the Act of Parliament, and I have no power, neither has the common law any power, to supplement any additional penalty upon either the persons who transgressed the law or the persons for whose sake or in whose favour such an act may have been done. Upon that part of the case I entirely concur with what was said by my brother Martin in his evidence before the Select Committee upon Elections.* When he was describing what the result would be of a breach of the law, he was asked by Sir George Grey, 'Do you mean that if it was proved that a candidate had committed

* June 29, 1869.

acts which were illegal and which subjected him to penalties (it is as 'a candidate' there, and I agree that we must read it in the same light in this case as if it had been a candidate, assuming it was one of those things which came within the general law of agency) the judge could take no notice of it, unless it was an act which vacates the seat?'—and in answer my brother Martin said: 'I think certainly that the mere doing of an act which the Act means to be subject to a penalty, but does not declare to affect the seat, could not by possibility affect the seat.' Now that is the very distinct opinion of a most learned and able judge, whose disposition, as the disposition of everybody who tries to look straight into things would be, is to give effect as far as possible to the provisions of an Act of Parliament; and I take it to be the duty of a judge to take care that he does not fritter away the meaning of Acts of Parliament by any subtle construction, but to give a bold (but at the same time a cautious) decision which shall further rather than defeat the object of any Act of this character. I am satisfied that there is nothing in this Act, however it may affect individuals, which can affect the seat. I grant that it is no great satisfaction to those whose interests may be in some degree affected by acts of this kind to be told that they can prosecute the offenders if they like. Anything more odious and objectionable than throwing it upon private prosecutors to proceed in these matters and prosecute the parties who are guilty I cannot conceive. However, that cannot affect the construction which I must put upon the Act of Parliament. I take this opportunity of saying that I think the Mayor did that which he was bound to do; I think he did the proper thing in the right manner. It is the duty of the returning officer, if he sees anything improper being done by a personation agent, or any person who is admitted for special purposes to the polling station, to see that he does not take advantage of his position to violate the law, and therefore I think he was perfectly justified in what he did and said upon the occasion."

Effect on election of payment of travelling expenses.

It was proved that the following letter, together with a railway pass, was sent by an agent of the Respondent to a number of voters who lived at a distance from the borough :—

"Cross and Knowles' Committee-rooms,
"*Feb.* 2, 1874.

"DEAR SIR,

"Your name being upon the list of parliamentary voters for this borough, you are entitled to vote at the forthcoming election. We enclose you a railway pass, on presenting which at the station named you will be furnished with a railway ticket to convey you to Bolton and back again. I trust you will be able to make it convenient to come over and record your vote in favour of Messrs. Cross and Knowles."

This letter was signed apparently by Mr. Hall and Mr. Winder, who were the Respondent's authorised agents for the election, but it was proved that neither of them actually signed any of these letters, or in fact authorised them to be sent. It was admitted, however, that the letters and passes had been prepared and sent out by a person who was in the position of an agent of the Respondent. It was proved that a certain number of these railway passes were used.

It was submitted by the Petitioners, first, that the sending of these letters and railway passes was either an act of bribery according to the doctrine laid down by the House of Lords in the case of *Cooper* v. *Slade*,* or a simple act of bribery within the meaning of the Corrupt Practices Act, 1854, s. 2; and secondly, that if it was not an act of bribery, still that it was an illegal act, which had been systematically and wilfully done for the purpose of influencing the election, and that, as such, it ought to be held to have avoided the election.

Mr. Justice MELLOR said as to this, in his judgment:—"This part of the case involves two questions. First of all, did what was done amount to bribery? Because, if it did, the election is void. If it did not, was it an allegal act, done (as Mr. Herschell opened it) systematically and intentionally with a view to evade and violate the law, the parties being perfectly indifferent as to its legality or otherwise, provided it could only give assistance to the party on whose behalf it was done? Now the first question is, was it bribery? If it could be brought within the doctrine laid

* 6 House of Lords Cases, 746.

down by the House of Lords in *Cooper* v. *Slade*,* it would be bribery, and would avoid the election *ipso facto*. In that case the House of Lords held that the promise 'If you will come and vote at the Cambridge election for Lord Maidstone and Mr. Slade your expenses will be paid,' was a conditional contract, and, as such, was an act of bribery. Now if the present case is like that, and the *ratio decidendi* of that case applies to this case, what was done in this case must have the same effect, because being an act of bribery it would come within the second section of the Corrupt Practices Act, 1854, and would upset the election. But let us see what the difference here is. The letter in this case was, I think, a most unwise and foolish one. When I heard it read, and after reading the letter in *Cooper* v. *Slade*, it did appear to me that if it were a question for a jury, a jury would be very apt to find that it was a conditional contract, like that in *Cooper* v. *Slade*. But the meaning of a letter is a question of construction for the Court; it is not a question upon which a jury (if there was one in this case) would have to decide; and therefore as a court of law I must consider this document. It is clear that this letter was written by persons who must be considered as agents of the Respondent, therefore if this letter, and what took place upon it, amounted to bribery, the Respondent must be unseated. But I think it does not. I think this is not a conditional promise at all. Undoubtedly the person who received this letter, together with a railway pass, might have put it into the fire if he had pleased; he might have used it, or he might not, just as he liked. All control over that railway pass was gone when it left the office of the Respondent's agent. That is how it stands. So far as it is in any sense a conditional bargain, or can be called a bargain at all, it is a bargain entirely one-sided—I put myself in your power, I send you a piece of paper to take you to Bolton and back again. To make it like the case of *Cooper* v. *Slade*, it should be a conditional promise—if you will come and vote for the Respondent the expenses of obtaining a railway ticket will be paid; that would no doubt have brought it within the case of *Cooper* v. *Slade*. But, as it appears to me, it was not

* 6 House of Lords Cases, 746.

a bargain of that nature, and that the voter was not bound by any other consideration than an honourable one, that is to say, this is sent to me that I may go to poll, if I were to take advantage of the opportunity afforded by this ticket not to vote, but to go to Bolton on my own business, or to vote for the other side, I should be doing a shabby thing; that appears to me to be the only sort of obligation, something arising from the idea of honour or good faith by which a voter receiving such a pass might be affected. But it is entirely free from that question which was the turning point in *Cooper* v. *Slade*. If he had voted for the other candidates, could they have recovered back the value of this pass from him? They could not. He was under no other obligation by accepting that pass than that which his own sense of honour might dictate; he was under no legal obligation whatever, and therefore it is not, in my opinion, within the case of *Cooper* v. *Slade*. Now I think the law as laid down in *Cooper* v. *Slade* is the governing law, except so far as it is affected by the provisions of 21 & 22 Vict. c. 87. *Cooper* v. *Slade* having laid down that very hard rule (for it was not pretended that a farthing was given beyond the actual expenses), the suggestion was made by one of the learned judges during the decision that if the Legislature thought their decision a hard one they might interfere. Accordingly the Legislature did interfere, and passed the above-mentioned Act of 21 & 22 Vict. c. 87, by which it is enacted that a candidate or his agent 'by him appointed in writing' may provide conveyance for any voter for the purpose of polling at an election. The Legislature were careful to provide that it should only be done by an agent appointed in writing, and the object undoubtedly was to guard against abuse. That enactment was intended to interfere to some extent, not probably to the extent of directly legislating upon the doctrine of *Cooper* v. *Slade*, but it was intended to provide, without danger to the election, for the conveyance of voters. That applied both to county and borough elections alike, and the interpretation which has always been put upon that section (I do not mean the judicial interpretation, because I am not sure that the question has ever arisen), but the general practice of all persons connected with county elections, and (up to the passing of the next Act of Parliament) with borough elections, with regard

to out-voters, has been to provide them with railway tickets to come up and poll, and to return after they have polled. But so careful was the Legislature to guard against money being given that they say,* 'but it shall not be lawful to pay any money or give any valuable consideration to a voter for or in respect of his travelling expenses for such purpose.' Therefore, although they allowed the agent appointed in writing to provide means of conveyance, they would not allow any money to be paid to a voter in respect of his travelling expenses for such purpose. Now this is mentioned with regard to Mr. Leresche's argument upon the question of bribery, because he says that this comes within the 2nd section of the Corrupt Practices Act quite independently of the doctrine laid down in *Cooper* v. *Slade*, as an offer of a valuable consideration to a voter in respect of his voting. Now if that is so, it applies both to county and borough elections, and every one of such railway passes would be a 'valuable consideration,' the object being to get people to vote. That would be so strange a construction of the words 'valuable consideration,' as applied to the other words of the section, that I should only come to that conclusion in case I found myself coerced by legal considerations to do so. It is difficult to see in what it can be a valuable consideration to a voter. The coming to vote and voting may be so deemed by the sender; he may think that he gets value, but it is difficult to see what value the voter gets by a free pass to the poll. That is the state of the law as it stood up to the time of the passing of the Reform Act, 1867. By that Act the Legislature extended enormously the constituencies of boroughs in England, and it very likely struck the Legislature that this extension would probably give occasion for an enormous expenditure in conveyances for bringing up voters to the poll. Therefore they determined to make a difference between county and borough elections, and what they did was to say, 'We will make a distinction in the case of borough elections. We did think it right after the decision in *Cooper* v. *Slade* to permit the agent of the candidate to provide conveyance in the case of voters generally, but now we will only allow that to be done in the case of county elections; we will not allow it to be done in all borough elections.' Therefore s. 36 was

* 21 & 22 Vict. c. 87, s. 1.

inserted in the Reform Act, 1867. Now, when we refer to s. 2 of the Corrupt Practices Act, 1854, which is a most comprehensive section, and which, I believe, was made to comprehend every existing definition of bribery, we find that it enacts what shall be bribery. The Act also enacts (in s. 23), that certain payments which it prohibits shall be illegal payments, and it subjects a person who offends either against s. 2 or s. 23 to a penalty. Now it must strike every one that if the Legislature had intended to enact in s. 36 of the Reform Act, 1867, that this payment for conveyance of voters should be punishable as bribery, nothing would have been easier than for them to have said it shall be a corrupt practice within the meaning of the Corrupt Practices Act, 1854. They do refer to the Act; they say that it shall be deemed an illegal payment within the meaning of it, but, as I have said before, if they had intended it to be made bribery, nothing would have been easier than for them to have said so. Looking at that Act of Parliament, I should have said that that omission was intentionally made, and I can quite understand their not making it bribery, because it does not come within the common notion of bribery as an immoral and corrupt thing. And also, judging from what we historically know, I am satisfied that the words were intentionally framed as they exist in the statute. I do not say that a judge could act upon historical evidence when he found the words clear, yet when I am asked to decide that the words of the statute, which enact that this should be deemed to be an illegal payment, should have a more extensive meaning than that, I look to the words to see whether they compel me to say so, and I come to the conclusion that they do not. Do they convey an inference to the contrary? I think they do. One member of Parliament proposed to enact as an amendment to the Bill that this should be a corrupt practice within the meaning of the Corrupt Practices Act, but that was negatived by the Legislature, and they refused to enact it. Therefore, historically speaking, I am quite satisfied that the construction I am putting upon s. 36 of the Reform Act, 1867, is the correct one, though I should not have been influenced to arrive at any other construction by any historical idea of what had taken place while this bill was before Parliament.

Effect of illegal act deliberately done to influence election.

"There remains only one other point, which I agree is a serious point, and it is one that was discussed by my brother Martin in the Salford case,* which is not exactly like this, but is a kindred case, where the payment was for cabs. My brother Martin intimated upon that part of the case that if he found it was done intentionally and wilfully in violation of the law, not that he should decide that it would upset the election, but that he should think it a case to be considered further by the Court of Common Pleas. I am not sure what would have been the course I should have adopted if the present case had come up to the hypothesis of my brother Martin (which it does not)—namely, that it was a systematic and general violation of the law to a very considerable extent, and was done wilfully and designedly by an agent for whom the candidate was responsible, because my own opinion is very clear upon the matter. I agree with the opinion of the late Mr. Justice Willes; he was decidedly of opinion that a violation of an Act of Parliament which itself created the offence and provided the penalty could not avoid the election; all it did was to inflict penal consequences upon the persons who did the acts. That also is in exact conformity with the evidence given by my brother Martin to which I have already referred, and it is also, I know, the opinion of my brother Bramwell, for when I communicated with him upon the point of the telegram,† I took the opportunity of asking his opinion upon this particular point, and in the answer which he gives me he entirely goes the length of Mr. Justice Willes, and entirely concurs in the view I have taken of the effect of s. 36 of the Reform Act, 1867."

Mr. Justice MELLOR, in his judgment, declared the Respondent duly elected.

Costs.

As to costs he said:—"If this had been an ordinary case, if one side had been clearly right, and the other side had assailed the seat without reasonable foundation, I should have made the costs follow the event as a matter of course—that is my invariable practice. But in this case, while I wish to be understood as fully believing that the sitting member himself is wholly free from

* Vol. i. p. 133. † Ante, p. 140.

blame, his agents have done what I consider to be an illegal act. They deliberately violated the plain intention of the Ballot Act. Again, I think that incurring the liability of those railway passes was contrary to law, although I acquit the sitting member and his agents in this matter of any intention of violating the Act at all; it was a mistake in point of law, and a mistake which it was not unnatural for the Respondent's agent, Mr. Winder, to make, he having been asked a question on the subject, and referring to a book * as an authority which he acted upon. We know it is very often said it must be true because it is written in a book. Mr. Winder seems to have acted a little under that impression, and to have acted upon the idea that books are infallible guides. People must take care that they do not rely upon these books too strongly. Under these circumstances, as there were two acts undoubtedly done by the agents of the Respondent which did, as it appears to me, invite a petition, that is to say, which might very fairly be considered by the persons who were advising the Petitioner as acts which not only were illegal, but might avoid the seat, I think that with respect to these two matters the Respondent must bear his own costs. But with regard to those individual cases of bribery which have entirely failed, so far as the costs are applicable to those cases, I think the Petitioners must pay them.

* It appears from his evidence that the book he referred to was Cox and Grady's work on Registration and Elections.

CASE XXV.

COUNTY OF NORTH DURHAM.

BEFORE MR. BARON BRAMWELL, MAY 25, 1874.

Petitioners: Burdon and others.

Respondents: Mr. Isaac Lothian Bell; Mr. Charles Mark Palmer.

Counsel for Petitioners: Mr. Hawkins, Q.C.; Mr. Serjeant Ballantine; Mr. Giffard, Q.C.; Mr. A. L. Smith; Mr. Gorst; Mr. E. L. O'Malley; Mr. Milvain.

Agents: Mr. H. E. Brown; Mr. R. Simey; Mr. S. L. Owen.

Counsel for Respondents: Mr. Serjeant Parry; Mr. Herschell, Q.C.; Hon. E. Chandos Leigh; Mr. Hugh Shield; Hon. E. Lyulph Stanley.

Agents: Messrs. Hoskins and Wyatt.

THE petition contained the usual allegations of corrupt practices by agent, and also an allegation that the election was void on account of general riot and intimidation.

Admissibility of statements made by third persons.

In the course of the case,

A witness who had been employed to canvass against the Respondents was asked by Mr. *A. L. Smith* for the Petitioners,

Q.—When you canvassed the tradesmen, what was the feeling you found among them?

A.—I found a reluctance to promise, and certain of them told me if they voted——

Mr. Serjeant *Parry*, for the Respondents, objected to this, as not being admissible. He submitted that the tradesmen them-

selves must be asked if it was sought to prove that they had been unduly influenced.

Mr. Baron BRAMWELL:—"I should be sorry to admit evidence before myself that would not be admitted by a judge sitting with a jury, because it is idle to suppose that he is not influenced by the same feelings as jurymen. But after the trained life one has had of considering questions of this kind, I do not think there is much danger. I think you are at liberty to ask the question as to generals, but you may not ask as to particulars. You may ask the general question, whether he found any particular difficulty in getting promises in a particular district, and if so, whether he can attribute it to any cause?"

Reception of evidence when name not in list of particulars.

A witness was asked as to an act of intimidation alleged to have been committed by one Woodman, whose name was not in the particulars.

Mr. Serjeant *Parry*, for the Respondents, objected to this evidence on the ground that no particulars had been furnished as to Woodman.

Mr. *Giffard*, for the Petitioners, submitted that although Woodman's name was not specifically mentioned in the list of persons alleged to be unduly influenced, still, that it was included in the following words, which were added at the end of the list: "also president, delegates, the council, and other officers of the Durham Miners Association."

Mr. Baron BRAMWELL:—"That certainly comprises Woodman. This comes rather within the sort of rule I laid down at Windsor against you, Mr. Giffard, namely, that there was a class pointed at, and this is one of the class. I do not think it will prejudice you, brother Parry, if I admit this evidence, as the man is in the neighbourhood, and you can call him."

Mr. *Herschell*, for the Respondents:—"It comes to this, that particulars are to be treated as though there were no particulars at all. Particulars are ordered; you give 150 specific cases, and you name a class including 40,000."

Mr. Baron BRAMWELL:—"You are quite right, these unhappy particulars are always a snare, either to the man who gives them, or the man who receives them, and sometimes to both. As far

as this particular case goes I will not strike his evidence out yet. If any detriment should arise from it we will endeavour to remedy it. If there are many more examples of this sort I shall be inclined to think that it is the result either of carelessness or worse, and the Petitioners must take the consequences."

Account of expenses filed by unsuccessful candidate when evidence.

A clerk from the Returning Officer's office was called by the Petitioners to produce the account of election expenses which had been filed by the Respondent. After producing it, he was asked in cross-examination by Serjeant *Parry*, for the Respondents, to produce the account of expenses which had been filed by the unsuccessful candidates.

Mr. *Hawkins*, for the Petitioners, submitted that it was not admissible. He asked whether the Respondents proposed to put them in as part of their case?

Serjeant *Parry*:—"Yes; certainly."

Mr. *Hawkins*:—"The seat is not prayed; and, besides, the unsuccessful candidate is not a petitioner in this case."

Mr. Baron BRAMWELL thereupon held the evidence inadmissible.

After a number of witnesses had been called in support of the various allegations contained in the petition,

Mr. Baron BRAMWELL inquired whether the Respondents thought they would be able to rebut the charge of general intimidation. He said he was anxious for information on this point, as he gathered from the cross-examination that the general intimidation was not denied.

Mr. Serjeant *Parry*, for the Respondents, asked for time before answering the question.

The Court then adjourned, and the learned judge had a conference in private with the Petitioners' and Respondents' counsel.

Upon the reassembling of the Court—

Mr. Baron BRAMWELL said:—"The learned counsel and myself have been talking this matter over together. What I am about to say has already been said between Mr. Hawkins, my brother Parry, Mr. Herschell, and myself, but I think it desirable

that I should state publicly what passed between us. It is that whatever arrangement may be come to between the parties it is my duty to consider and determine whether I ought to declare the Respondents guilty of corrupt practices by themselves or their agents. Supposing no further evidence were given on either side it would be my duty to act upon that which has been already given, as of course if those who could contradict the evidence, if it were untrue, do not think fit to contradict it, the conclusion is that it is true. Now, undoubtedly there is evidence, as the case at present stands, as to bribery, treating, and undue influence by agent. Therefore I desire to intimate publicly that if the matter stops here I must not only declare the election void on the ground of general intimidation, but I must also declare it void on the ground of corrupt practices by agent. I have only one word more to add, namely, that it was in the interest of the parties, and by way of saving expense, that I asked what I did yesterday, and if the Respondents should tell me that they can answer the case of general intimidation that has been made out I can undertake for myself to say that I shall attend to it as though I had not indicated anything like an opinion yesterday.

Mr. Serjeant *Parry* then stated that since the day previous the Respondents had fully considered the subject of general intimidation, and they felt that it was utterly impossible to alter the facts that had been proved to the Court. But that as to the charges of corrupt practices by agent he was prepared to call evidence to rebut them.

Mr. *Hawkins*, for the Petitioners, then stated that, as one of the main objects of the petition had been accomplished by the declaration that the election was void on the ground of general intimidation, he did not propose or think it right or proper to prolong the inquiry by calling any more evidence. If the Respondents thought it right to call evidence to rebut the allegations of corrupt practices by agent, he should not think it his duty to prolong the inquiry, and add to its expense by cross-examining them. He must not however be taken to admit the truth of any contradictions they might think it right to make of witnesses he had called, or to abandon the evidence already given.

Mr. Baron BRAMWELL:—"I must say upon the fullest consideration I can give to the matter that you are not here in the nature of a public prosecutor, therefore if you do not choose to cross-examine the witnesses merely because you are not interested in the result, I do not see that anyone can blame you, or that I ought to attempt to make you do it. But I give very distinct warning that, if no one else does, I shall do so to the best of my ability; in fact, I must do so, as I have to adjudicate as to which of the two I believe."

Evidence was then called by the Respondents to rebut the charge of corrupt practices by agent.

Mr. Baron BRAMWELL, in his judgment, declared the election void, on the ground of general intimidation, but stated that the charge of corrupt practices by agent was rebutted by the evidence which had been given on behalf of the Respondents.

What undue influence is within Corrupt Practices Act, 1854.

As to what evidence is necessary to bring a case of undue influence within the operation of the Corrupt Practices Prevention Act, 1854, s. 5, he said:—

"When the language of the Act is examined it will be found that intimidation to be within the statute must be intimidation practised upon an individual. I do not mean to say upon some one person only, so that it would not do if practised upon two or a dozen, but there must be an identification of some or more specific individuals affected by the intimidation, I will not say influenced by it, but to whom the intimidation was addressed, before it could be intimidation within the statute, otherwise it comes under the head of general intimidation."

As to general intimidation, he said:—

General intimidation discussed.

"I take it that the law is this; first of all, there is the statutory intimidation, that contemplated by the statute, if one may use such an expression, that is, an intimidation contemplated by the statute which avoids the seat, where a candidate or his agent is guilty of it. But besides that there is another intimidation that has been called a common law intimidation, and it applies to a case where the intimidation is of such a character, so general and extensive in its operation that it cannot be said that the polling was a fair representation of the opinion of the constituency.

If the intimidation was local or partial, for instance, if in this case it had been limited to one district, as Hetton is, I have no doubt that in that case it would have been wrong to have set aside this election, because one could have seen to demonstration that the result could not possibly have been brought about by that intimidation, and that the result would not have been different if it had not existed. I do not mean the result of the polling in that particular district, but the general result of the majority for the Respondents. But where it is of such a general character that the result may have been affected, in my judgment, it is no part of the duty of a judge to enter into a kind of scrutiny to see whether possibly, or probably even, or as a matter of conclusion upon the evidence, if that intimidation had not existed, the result would have been different. What the judge has to do in that case is to say that the burden of proof is cast upon the constituency whose conduct is incriminated, and unless it can be shown that the gross amount of intimidation could not possibly have affected the result of the election it ought to be declared void. Now in questions of this sort one must look not only to the amount of intimidation, but to the absolute majority which has been obtained. It was the opinion of Mr. Justice WILLES,* and I believe it is not inconsistent with the opinion of Mr. Justice KEOGH,† as expressed in that celebrated and most useful judgment which he gave in the Galway case, that you are to look at the probable effect of intimidation, which consists of two things, the extent and operation of the intimidation, and the majority which the sitting members got. Now, I think if it were otherwise, and if one were told that partial intimidation would avoid an election, although it were certain that it had not affected the result of the election, the consequence would be that a few mischievous persons might upset every election. On the other hand, if one were inclined to go into a kind of scrutiny the consequence would be that one might make a very great many mistakes; besides, I am of opinion that, where there has been so large an amount of intimidation that it is uncertain whether the result would have been the same without it, it cannot be said that the election was free, or that it represented the real opinion of the constituency,

* *Semble*, Westbury, Vol. i. p. 50. † Ante, p. 57.

but that it must be held void on account of that uncertainty. Now, was there such general intimidation here? I have no doubt that there was. Here we find it prevailing not in one place only, it is not local, we find it prevailing at Hetton, Coxhoe, Seaham, Hartover, Durham, and to some extent at Lanchester. How is it possible to say under these circumstances with certainty that the result was not affected by this intimidation. So far from being of that opinion, I doubt extremely when I look to what the majorities were, whether the result would have been different if the election had been free and fairly conducted.

"Now, the intimidation that existed at these places was of two kinds, one more venial than the other. The more venial kind was the intimidation which consisted in threatening voters that they should lose custom if they did not vote in uniformity with the wishes of their customers. As Mr. Justice WILLES said,* I am not sure that that is actually unlawful; in fact, I am of opinion that it is not actually unlawful. I suppose it is open to a man to say, 'I choose to deal with you not in accordance with the merits of the commodities you sell to me, but according to your politics on one side or the other.' And I suppose if one man can do this, fifty men may do it. But do not let a mistake be made. Though it is not unlawful in the sense of being punishable, like violence, yet it has undoubtedly this characteristic of illegality about it, namely, that if, as in this case, it prevails to a large extent, it frustrates the object of those who are guilty of it, and though it may not be unlawful it is a thing to my mind most earnestly to be deprecated. And if I wanted an authority for this, I could not cite a better, or one who would have more weight with the men who have been guilty of it, than that man who said he had thought it wrong to interfere with voters ever since he knew what liberty was. And I cannot help citing a case, in the hope that my citation may do some good to those who are interested in this matter. About six weeks ago I tried an election petition at Windsor. There a man, a person of property, in consequence of the election which took place in 1868, turned about twenty of his tenants out of their houses for no other reason than because they had acted according to their

* *Semble*, per Blackburn, J., North Norfolk, Vol. i. p. 241.

consciences, and voted in opposition to him, he being a candidate. I am sorry to say I could not unseat him for it, for this reason, that I could not trace that the intimidation was in operation at the time of the election in 1874, because it did not appear that he had done anything to coerce the people and get their votes, or that he had repeated the threat which had been uttered to them, and no doubt the ballot afforded them protection. But why I cite this case is not so much for the purpose of making this observation upon it, as for the purpose of asking those who have been guilty of this kind of conduct here what they would think of his conduct. Do they approve of it? Would they think it right in the case of a landlord of a large number of cottagers that he should turn them all out, although they were respectable men and had paid their rents, for no other reason than that they did not hold political opinions in conformity with his? You may say that there is a difference between the two cases. But what difference is there between the case of a landlord who will not have a man for his tenant, and a customer who will not have another for his grocer, butcher, or publican, because he held different political opinions? Absolutely none. Of course one does not ask the people for that which one knows cannot be got. It is no use exhorting people to be better than human nature is capable of being. It is a question between two persons. I do not at all see why a customer should not deal with a red, if he is himself a red. You must choose one, and I do not see any harm in that. But where friendly relations have subsisted between two people, and the customer is satisfied with the tradesman and the tradesman with the customer, that they should quarrel and fall out and part company because they do not hold the same political opinions is highly to be deprecated, and I exhort them to remember what was said by one of their own body, that it is wrong for anybody who knows what liberty is. It is due to them that I should say one thing, which is, that they have not been nearly so bad as they threatened to be, for, with only one exception, none of the tradesmen who were called, have said that the threats have been carried into execution, or at all events, if they have been, the customers all of them afterwards repented and came back. Nevertheless this kind of intimidation did exist

to a very considerable extent, and to the extent to which it did exist it prevented the election being a free one.

Now, the other intimidation is of a different character. It was proved that the committee-room at Hetton was wrecked, that the police-office was stormed and the prisoners liberated, that the vicar's house and other houses were attacked, that savage violence was used at Seaham Harbour, that a number of men were ill-treated, and a conveyance flung over the cliffs. Such a state of things having been proved it only remains for me to say formally what I stated before, namely, that this election is avoided on account of general intimidation. It may be hard upon the Respondents, and it may be hard upon that part of the county which has not misconducted itself that it should have the worry of an election to go through again with possibly a different result, but the only way to get rid of this kind of offence is to visit the consequences of it upon those for whose benefit it was committed. The intimidation cannot be punished, and it follows as a sort of consequence that with the view of preventing similar practices the election must be declared void.

Costs. Costs followed the event.

CASE XXVI.

BOROUGH OF BOSTON.

BEFORE MR. JUSTICE GROVE, JUNE 1, 1874.

Petitioner: Mr. Malcolm.

Respondents: Mr. William James Ingram and Mr. Thomas Parry.

Counsel for Petitioner: Mr. Hardinge Giffard, Q.C.; Hon. A. Thesiger, Q.C.; Mr. Cave.

Agents: Messrs. Collyer and Bristowe.

Counsel for Respondent Ingram: Mr. Hawkins, Q.C.; Mr. J. O. Griffits.

Agent: Mr. W. Ford.

Counsel for Respondent Parry: Mr. Serjeant Ballantine; Hon. E. Chandos Leigh; Mr. Mellor.

Agents: Messrs. Wyatt and Hoskins.

THE petition contained the usual allegations of corrupt practices, and prayed the seat for the Petitioner.

In the course of the case,

Charitable gift, when a corrupt practice.

It was proved that the Respondent Parry had formerly represented the Borough in Parliament, and was intending to become a candidate again at the next election, that he lived in the neighbourhood, and was in the habit of giving largely to the local charities through the medium of other persons, and of entrusting sums of money to the clergy and other persons to distribute among the poorer classes. That in the course of the December preceding the election the Respondent Parry, without consulting any one else on the subject, determined in his own mind to make

a distribution of coals among the poor in the Borough. He accordingly wrote to a person named Wright the following letter:—

"My dear Wright,—

"I have been in the habit of sending a small gift to your Mayor and another to the Vicar, about this time of year, but the weather has become suddenly so seasonable and sharp that I think I can best help the poor people by a direct gift in coals. My trouble is in the arrangements needful for such an end, and in finding friends willing to interest themselves to distribute 100 or 120 tons of coals at once. The selection of recipients need not be political, nor be confined to the mankind, widows and deserving poor people of all classes may be thought of. I do not mind if you go up to 150 tons, but that will be my limit. Harris, if he be in the coal trade, may supply a third, and I think Turner and Ridlington also a third. You will perhaps enlist some persons to help you, and issue tickets or take other means to carry out this gift to warm these poor people's firesides. This need not be made public, nor, as I have said, need it be political. Dyer will help, and so I think will Mr. and Mrs. Bailey. Do the best you can, distribute the coals, and send the account to me."

The Respondent himself did nothing more in the matter, and heard no more about it until after the election, but what actually took place was as follows. Instead of the coals being distributed as the Respondent Parry had intended, to the poor of the district, cards were printed, without his knowledge, and bearing the signature of one Dyer (who acted subsequently at the election as the Respondent's agent for the election expenses) with these words on them, "Please deliver cwt. of coals to [A. B.]. For Thomas Parry, B.B Dyer;" and on the back of the cards were the words, "With Mr. Parry's compliments." These cards were distributed in the course of the month of January (but before it was known that an election was imminent) to a large number of persons, some of whom were voters and some not.*

* These facts, so far as they are not mentioned in the learned judge's judgment, are taken from the shorthand writer's notes of the evidence given by Mr. Parry and Mr. Dyer.

Mr. Justice GROVE, in his judgment, as to this said as follows:—

"There are two questions involved in this distribution of coals with regard to the Respondent Parry. First of all, was this distribution made by him with the intention of, in legal language, corrupting the electors? It is not necessary for the purpose of what is called 'corrupting' the electors, taking the expression in its legal sense, that the word 'corrupt' should have a criminal sense attached to it. It has been over and over again held* that an unfair and improper donation with the view, motive, and intention of securing a vote is corrupt within the meaning of the Corrupt Practices Act, 1854. It might be a doubtful question (and it is one which was discussed in the Windsor case†) whether, assuming two motives to exist, the one being pure, and the other with the intention to corrupt, you could exclude the corrupt intention, and rely wholly upon the pure intention. I think that must be rather a question of degree. A man may wish to be charitable in a neighbourhood, but at the same time he may have an eye to his own interests, and there must be in fact some limiting line, incapable of being defined in words, where the two things come to a nearly equal balance. We know, for instance that persons looking forward to be candidates for Parliament are generally pretty liberal to the charities in the district, and such liberality, so far as I am aware, has never been held to vitiate the election; I suppose upon the grounds that such persons do not select voters, as contradistinguished from non-voters, as the objects of their charity, that the object itself is good, and that although the donors may, in so bestowing their charity, look to their personal interests and personal ambition, still a man is not to be injured in an object of personal ambition merely because he does good, which perhaps without that stimulus he might not have been induced to do. If the time at which the late dissolution would take place had been well known, if it had been a certainty that Parliament would be dissolved on January 26, and if the donation had been made on January 14, with that knowledge, I must say that I do not think I could have come to any other conclusion than that it was a personal act of corrup-

* See cases collected in Bushby on Elections, ed. 4, pp. 130—132.

† Ante, p. 89.

tion on the part of the defendant, or, at least, I should have been very much oppressed with the matter. That, however, was not the case. Mr. Parry says (and I certainly accept his statement, confirmed as it is by what was the almost universal impression at the time, as to the probability or otherwise of an immediate dissolution) that he thought that Parliament would continue to exist, at all events, long enough for practically completing the business of the Session, and that it would be dissolved in August or possibly a little earlier. Mr. Parry tells us that he formerly represented this borough, and that he has constantly been looking forward to becoming a candidate again, that he has been in the habit of giving largely to the local charities, and that he gave this coal by way of administering charity, but he expressly negatives that he in any way selected voters, or those who might be voters, as the objects of his charity, and he declares that his gifts were, in fact, gifts to the poor, and that he put them for distribution into the hands of Mr. Wright, into whose hands he had previously put other things to distribute. When we look at these things in the light of the then existing events, it seems to me that there is not much difference between this Christmas gift and previous subscriptions to charities or gifts of money to clergymen for the poor generally, and certainly I do not think I ought to assume that which the evidence does not fairly bear out, that is to say, that it was necessarily corrupt, when a reasonable motive may be assigned which is consistent with Mr. Parry's previous acts. I am far from saying that I do not think that Mr. Parry had in view making himself popular in his candidature for the borough, that is to say, that he was more liberal in these subscriptions than he would have been if he had not been looking forward to being a candidate. I think it is necessary to say that my mind is not altogether free from a doubt in this particular case, and although, under the circumstances, I do not now hold that Mr. Parry is personally guilty of a corrupt practice within the meaning of the Act, I am by no means certain that in a subsequent case, coming next year or at some other time, I might not so hold upon precisely the same facts. It is as well that the public should know that when a judge pronounces an opinion upon a certain state of facts, he takes into considera-

tion the existing state of knowledge and the existing circumstances, but when upon a second occasion persons seek to avail themselves of that ruling, and think that they can do a wrong act, simply trying to keep within the particular facts which upon the former occasion were held not to be corrupt, they frequently do acts which must be held to be corrupt. It may be that upon precisely the same apparent state of facts, an act which is not held corrupt at one time may be held corrupt at another time, because knowledge goes on, and if the second act is a mode of effecting a corrupt purpose, merely getting out of a judicial decision upon the previous state of circumstances, then that which in the first instance is not corrupt would in the second instance become corrupt. It is well that persons should know that these matters must depend upon the circumstances, and that people cannot successfully evade the law by simply, as they think, getting out of the terms which the judges use in their expositions of the law. There are neither in the English language or in any other language, terms which can be used which will exclude all possible conclusions but one; I am therefore anxious, in giving this decision, merely to say that it has not been established to my satisfaction, that there has been, under the circumstances, any personally corrupt act committed by the Respondent.

Effect of acts of agent.

I shall now state my opinion as to the effect upon the election of the conduct of others for whose acts the Respondent Parry is in law responsible. Instead of the coals being distributed, as the Respondent intended them to be, to the poor of the district, certain cards were printed without his knowledge, and bearing the signature of Mr. Dyer, who was subsequently, if not at the time of the distribution, Mr. Parry's agent for election expenses. Mr. Dyer took a very active part with reference to the election, and he distributed the cards which we have seen. When Mr. Parry was asked by Mr. Giffard whether the card did not look very much like an electioneering canvassing card, Mr. Parry said, "I will not assert it," but he does not negative Mr. Giffard's question. Nobody can say that this looks like a charitable distribution. Those cards were given to people, a great number of whom were in the class of voters,

and although they were given to a great many who were not voters, I have no doubt at all that this gift of coals was made use of by Mr. Dyer, and possibly by others who were promoting Mr. Parry's election, for the purpose in plain language of getting their votes. If so, that was a corrupt act within the meaning of the Corrupt Practices Act. There was a good deal in the evidence that I might go through, but there is ample evidence to satisfy me that although Mr. Parry may have intended it generally as a charitable gift, and with the view of making himself popular by charitable gifts, yet in the hands of those who acted for him it was made an agency for getting votes for him. It was therefore corrupt within the meaning of the Statute, and by that act, for which the Respondent Parry is responsible, he is unseated.

Contempt of court.

It was proved that after a witness named Lill had given his evidence, and as he was leaving the court, one Symes, as Lill was passing him, called him "a bloody thief." Symes was in consequence ordered to appear in Court. On his appearance—

Mr. Justice GROVE read over to him the evidence of Lill as to this matter, and asked him what he had to say in answer.

Symes admitted the truth of the charge, and humbly begged his lordship's pardon.

Mr. Justice GROVE then said, that as he had apologised and stated that it was the effect of temper he would treat him leniently, and content himself with fining him five guineas.

Mr. Justice GROVE in his judgment declared the election of the Respondent Parry void on account of bribery by agent, and reserved for the Court of Common Pleas the question whether the election of the Respondent Ingram was void also in consequence of his joint candidature with the Respondent Parry.*

Effect of coalition.

As to the effect upon the Respondent Ingram of his coalition with the Respondent Parry, he said as follows:—"The general

* This case has not as yet been argued.

question will be this. The law has decided that a candidate at an election is responsible for the acts of agents, who are not, and would not necessarily be, agents under the common law of agency. At common law a person is only responsible for such acts of his agents as are within the scope of the authority which he has given to those agents. For instance, if I authorise a man to buy a horse for me, I am responsible for his conduct about the purchase of that horse, but if that man, whom I tell to buy a horse for me, goes and sells a farm of mine I am not responsible for the act. That is putting it in a very simple form; but with regard to election law, the matter goes a great deal farther, because a number of persons are employed for the purpose of promoting an election, who are not only not authorised to do corrupt acts, but who are expressly enjoined to abstain from doing them, nevertheless the law says, that if a man chooses to allow a number of people to go about canvassing for him, generally to support his candidature, to issue placards, to form a committee for his election, and to do things of that sort, he must, to use a colloquial expression, take the bad with the good. He cannot avail himself of these people's acts for the purpose of promoting his election, and then turn his back, or sit quietly by, and let them corrupt the constituency. Therefore the law carries the responsibility of a Member of Parliament for the acts of the agents, who are instrumental with his assent in promoting his election, a good deal farther than the mere common law of agency. Then comes the question in this case, whether the Respondent Ingram was assenting in the beginning of December to a coalition with the Respondent Parry, whether he made Mr. Parry, so to speak, his agent, or made Mr. Parry's agents his agents, or whether he has made a joint committee (if such an one was established to carry on both elections) his agents. That is a new question of law upon which there is a good deal to be said. On the one hand, it may be asked, why is a man to be less the agent of a member because he happens to be a co-candidate with him, than if he were not a co-candidate with him? On the other hand, it may be said that a man is not so responsible for all the acts of his co-candidate as he would be for the acts of another agent,

because the co-candidate has his own interests to look after. It seems to me to be a fairly arguable point, and that point I shall reserve for the Court of Common Pleas.

Costs. As to the costs he said, "The costs of that portion of the case which is reserved will follow the judgment that will be given by the Court of Common Pleas; this was so in the Launceston case, and the Court has clearly the power to do this under s. 41 of the Parliamentary Elections Act, 1868. The costs of the petition, so far as relates to the unseating of the Respondent Parry, must follow the result."

The Respondent's counsel then withdrew from the case, and the claim to the seat was gone into.

Mr. *Giffard,* for the Petitioner, submitted that on proof that a voter had received a gift of coals from the Respondent's agent, and that after having received the gift the voter had voted, he was entitled under s. 25 of the Ballot Act* to require the judge to strike off one vote on account of each such voter.

Mr. *Chandos Leigh,* instructed on behalf of a number of the voters for the borough, consented to the evidence being so given and to abide by the result of a case stated for the Court of Common Pleas.

The Registrar of the Court was then sworn, and the marked register, the counterfoils, and the ballot papers were, by the direction of the judge, brought into Court.

After a sufficient number of votes had been struck off to place the Petitioner in a majority of two votes—

Mr. Justice GROVE said as follows: "The majority is merely nominal because there were no doubt a large number more who received these gifts of coals. Supposing that the Court of

* Section 25 is as follows: "When a candidate on the trial of an election petition claiming the seat for any person is proved to have been guilty by himself, or any person on his behalf, of bribery, treating, or undue influence in respect of any person who voted at such election . . . . there shall on a scrutiny be struck off from the number of votes appearing to have been given to such candidate one vote for every person who voted at such election and is proved to have been so bribed . . . ."

Common Pleas are of opinion that enough has been done by proving the receipt of what I have held to be corrupt gifts, that establishes the seat for the Petitioner. On the other hand, if they consider that it is not enough, then it will be a void election, and there will be a new election.*

* The special case stated and the judgment of the Court of Common Pleas thereon are reported in Malcolm *v.* Parry, L. R. 9 C. P. 610.

CASE XXVII.

BOROUGH OF KIDDERMINSTER.

BEFORE MR. JUSTICE MELLOR, JULY 6, 1874.

Petitioners: James Youngjohns and Charles Thomas.

Respondent: Mr. Albert Grant.

Counsel for Petitioners: Mr. Charles Russell, Q.C.; Mr. Chandos Leigh; Mr. Bowen.

Agents: Messrs. Cooke and Talbot.

Counsel for Respondents: Mr. Hawkins, Q.C.; Mr. Morgan Howard, Q.C.; Mr. Biron; Mr. Montagu Williams.

Agents: Messrs. West and King.

THE petition alleged that the Respondent by himself, by his agents, and by other persons on his behalf, was guilty of bribery, treating, undue influence, and personation before, during,* and after the election.

5. "That the Respondent by himself and his agents, before and at the date of the said election, corruptly made divers promises of money, meat, drink, provision, and other reward, in order to induce voters to vote and to refrain from voting.

6. "That general bribery, treating, and undue influence were practised before, during, and after the election.

7. "That after the election and return, and within 28 days before the presentation of this petition, that is to say, on a certain

* It may be observed that the words "before" and "during" were struck out of the petition in the Brecon case, ante, p. 43, by order of Lush, J., at chambers. See *Times* newspaper, April 22, 1871.

day believed to be the fifth day of May, 1874, payment of a sum of money was made by the Respondent to one Jefferies, to wit, £1000, in respect of corrupt promises as aforesaid, and in pursuance and furtherance of the corrupt practices hereinafter alleged."

Then followed allegations similar to the last with respect to the payment of other sums of money to other persons, and also allegations with respect to the gift to certain persons, and to other persons at present unknown, of meat, drink, provision, and entertainment, and a final allegation, numbered 22, that in respect of the allegations contained in paragraphs numbered 7 to 21 inclusive, and each of them, the Respondent was not duly elected and returned, and that his election and return were and are wholly null and void.

Mr. *Russell*, in opening the Petitioners' case, mentioned a number of cases of bribery before the polling-day, as to which he intimated that he intended to call evidence.

Upon evidence being tendered in proof of one of these cases of bribery—

Scope of inquiry upon a petition presented within twenty-eight days after alleged act of bribery.

Mr. *Hawkins*, for the Respondent, stated that he should object to a great part of the evidence which had been opened, and submitted that all the matters which were the subject of the first petition (which had been withdrawn) ought to be altogether excluded from the evidence upon this petition, which was presented under the concluding part of the Parliamentary Elections Act, 1868, s. 6, and that no evidence could be gone into in this petition, except what related to corrupt payments within 28 days before the filing of this petition, and that no corrupt practice committed previously to that time, even though it could be distinctly proved, could be introduced by way of mere prejudice, and for no other purpose.

Mr. Justice MELLOR stated that evidence given for the purpose of prejudice could not be admitted, but that he was of opinion that anything which threw light upon corrupt payments which were alleged to have been made within 28 days must of necessity be admitted.

Mr. *Russell* submitted that the effect of this 6th section of

the Parliamentary Elections Act, 1868, was to extend the period for presenting a petition from 21 days after the return to a period of 28 days after any corrupt payment had been made. He cited a dictum of Keogh, J., reported in 1 O'M. & H. 341, in support of his argument.

Mr. Justice MELLOR said he should not be disposed to shut out any evidence which might appear material, but that if it should turn out hereafter that the circumstances of the case required it, he would take the opinion of the Court of Common Pleas upon the point. He further stated that he desired to call attention to the report which he was required to make to the Speaker, under which any corrupt payment by either candidate was required to be stated.

Subsequently, in his judgment, he said as follows as to the nature of the petition:—

Nature of petition presented within twenty-eight days of bribe paid subsequent to the election.

"This is a petition presented, not under the ordinary law, that is to say, within the 21 days, but under a subsequent part of the 6th section of the Parliamentary Elections Act, 1868. That section prescribes that a petition shall be presented within 21 days after a return has been made to the Clerk of the Crown, unless it specifically alleges a payment of money or other reward to have been made by any member, or on his account, or with his privity, since the time of such return, in pursuance of corrupt practices, in which case a petition may be filed within 28 days of such payment. Now, that is open to two considerations, one of which is this—namely, that although it is true that a petition complaining of corrupt practices must be presented within 21 days after the return, yet if payments are subsequently made, then that the time of presenting the petition shall be brought down to within 28 days of the last payment to which reference is made in the petition. Now, there are certainly many observations to be made in favour of a construction which has been urged (I do not mean to say argued, but urged and stated) that that does have the effect for all purposes of bringing the inquiry down to the date of the 28 days, and that, notwithstanding the lapse of the 21 days, I am at liberty to go into a full inquiry with a view to considering the question of the seat as to all the corrupt practices that took place at the election. The other

opinion is that, with a view to unseat the Respondent, my attention must be directed to these subsequent payments alone, and to such evidence as throws light upon the nature and character of those payments, in order to show that they were payments made in pursuance or furtherance of corrupt practices. Now, there are different opinions prevailing with regard to this matter. Some judges* think, and possibly theirs may be the better opinion, that payments of expenses, which might have been inquired into upon a petition presented within the 21 days may not be inquired into upon a petition presented within 28 days of the last payment made in pursuance of the corrupt practice. The other opinion is that it brings down the whole matter so as to constitute the petition presented within 28 days the last petition, into an original petition, upon which evidence might be gone into, as if it were the original petition. I myself rather incline to think that it must be the duty of the judge to confine the inquiry to the last payment within the 28 days, but I am bound to say that it is not the opinion I originally entertained. I have been brought over to that opinion during the present inquiry; therefore I certainly should not have acted upon it, if it had been necessary to decide the point, but I should have referred it to the Court of Common Pleas to decide whether I had jurisdiction to unseat the Respondent in respect of practices which ought to have been inquired into under a petition presented within 21 days after the return of the writ."

In the course of the case—

Corrupt practice after conclusion of election.

It was proved that only a few days before the election the Respondent was suddenly invited to come down and contest the borough. He accordingly came down, and after making a variety of speeches at various places, he made a speech upon the night before the poll, in which he said, "Well, when we have won the election, we will have an entertainment together," or words to that effect. Again, on the night after the poll, just before leaving the town, he said as follows: "I am going to return to London to-night, but I hope soon to be down among you again, and when free and untrammelled by the election law, we will have a day's

* *Semble*, Lush, J.; see note to p. 170.

enjoyment together," and on a third occasion, some time after the election, he made another speech to the electors, in which he said as follows: "One thing more. You know when I was returned for this place I promised the town that, so far as I could contribute to it, I would come down, and we would have two or three days' jollification together." In pursuance, as it appeared, of this promise, the Respondent gave orders that an estimate should be prepared for a grand *fête*, and the following estimate was submitted to and approved by him:—Five bands, £50; horses and carriages for procession, £60; six large marquees, £50; filling marquees with seats and tables, £60; 2000 dinners at 5*s*. a head, £500; 100 dinners at 20*s*. £100; 5000 teas for women and children, £300; 8000 yards of blue ribbon, to be distributed among women and children, at 3*d*. a yard, £100; printing and postages, £40; contingencies for retiring-rooms, fireworks, labour, &c., £270; making in all £1480. In addition to this, the Respondent agreed to distribute among the electors medals and rosettes; as to this the Respondent wrote as follows: "I think that an excellent idea, the pleasure of wearing it will get a good many friends over from the other side, and this will be the means of keeping our party together on, I hope, many occasions." As soon as the preparations for this entertainment were complete, and the contracts made for carrying it into effect, the Respondent sent down two cheques for £500 each, payable to the order of Mr. Burcher, a solicitor resident in the borough, who acted as legal agent to the Respondent, and Mr. Jefferies, an alderman of the borough, and an active supporter of the Respondent. These cheques were paid into the bank at Kidderminster, and placed to the joint account of these two gentlemen, to be used by them for the purposes of the entertainment. The cheques were sent to Mr. Jefferies, enclosed in a letter, which was not forthcoming at the trial of the petition, and was stated by Mr. Jefferies to be no longer in existence. When, however, the proceeding had advanced to this point, it was suddenly suggested (in consequence of something which had appeared in a local paper as to a similar entertainment which had been projected at Warrington) that an entertainment of this kind might have a very prejudicial effect if the Respondent should be

a candidate again at the next election. Consequently the opinion of counsel was taken, and in pursuance of the advice so given, it was determined to abandon this proposed entertainment, and to send back to the Respondent the £1000 which he had advanced. But as some considerable liability had been already incurred on account of orders which had already been given to tradesmen for things that would be required at the entertainment, it was suggested that these liabilities should be defrayed out of the £1000, and only the balance sent back. But to this course Mr. Jefferies strongly objected, and ultimately it was decided to send back the £1000 intact. Accordingly the £1000 was returned to the Respondent, but it was accompanied by a letter from Mr. Jefferies (the original letter was not forthcoming) to this effect: "Although we send you back the £1000, you must understand that the committee have entered into contracts, and they will have to make payments in respect of matters delivered, and therefore you must be so good as to send us £300." This sum the Respondent sent as requested.

Upon these facts, it was submitted by the Petitioners that the payment by the Respondent of this sum of £1000 towards the expenses of this entertainment was a corrupt payment in pursuance of the promise made by him before the election, and was a corrupt practice within the meaning of the Corrupt Practices Act.

On behalf of the Respondent it was contended, (1) that the expressions made use of by the Respondent in his speeches to the electors were mere hasty and unguarded words, and could not be treated as a deliberate promise and, (2) that even supposing he had made such a promise, the fact that the idea of the entertainment was abandoned as soon as it appeared that there was any danger of it being held to be an illegal proceeding, was sufficient to show that no corrupt act had actually been committed.

Mr. Justice MELLOR in his judgment said as to this: "I confess that if the case rested solely upon that speech which the Respondent made upon the night before the poll, I should have been very much disposed to give him the benefit of a doubt as to what was really intended by him. I might have thought, and probably should have, that although he had used these words 'Well, when

we have won the election we will have an entertainment together,' they were the mere hasty words of a person suddenly called upon to make a speech to electors. I should have given him the benefit of any doubt I might have entertained as to the effect of those expressions had it not been for what subsequently occurred. But I cannot look upon that statement in that speech as I would upon an isolated expression used in the heat of the moment, when I call to mind the words which he used on the following night. Those words are to my mind very important words, because they convey to my mind that the Respondent was only restrained by a terror of the trammels of election law from at once affording to the electors such a treat as he had promised on the previous night. Now, it was said by one of the witnesses that he believed the people did not care much about the promise and did not pay much attention to it. For my part, from what I have heard and seen, I think there are a great many electors in Kidderminster who would be influenced by such a promise, and who would regard it as the only part of the speech that was worth their listening to, and which they would be likely to be influenced by. The Respondent is a gentleman well known for his munificence and for the liberality of his gifts, and I think that the electors would be influenced by the expectation that they were to have a reward for their exertions in returning the Respondent to Parliament, and that they were to have a treat, not a mere insignificant treat, but a real treat, which would give to themselves and their families a satisfaction which they would not otherwise obtain. But that is not all: the Respondent comes down on a subsequent occasion and makes a third speech to the electors. He says 'One thing more—you know when I was returned for this place,' just observe the words, 'I promised the town that, so far as I could contribute to it, I would come down and we would have two or three days' jollification together.' That is the Respondent's own interpretation of his own promise, and I am at a loss to understand how I am to come to any other conclusion than that the promise which was made upon the two first occasions by the Respondent, coupled with what he said on the third occasion, was a promise to be hereafter performed by the gift of meat, drink and other entertainment, and that being so, it was a

corrupt promise, and was the foundation of all that subsequently took place. But the important matter was this, whilst the arrangements for this entertainment were in the act of being completed, the Respondent sends down two cheques for £500 each—for what purpose? If there is anything clear in this case it is that these two cheques were sent down for the purpose of being used on account of this entertainment, to be drawn upon for the expenses to be incurred by the committee. Well, it was not drawn upon, and why? Because the idea of the entertainment was abandoned. Then comes this question, did this abandonment operate or act retrospectively so as to get rid of all the attempts to carry it out. I think certainly it did not. I think the promise amounted to a corrupt practice. I think the carrying out of the scheme was the carrying out of a corrupt practice, and, although it was not completed, but stopped *in medio*, it is perfectly clear to me that that could not purge what had been done, that they had entered into contracts, and it was not because they got rid of some by compromise and paid others, that they could say 'Oh, this is all moonshine, there never was any real carrying out of the promise, it was abandoned as soon as it was entered upon, and there was an end of it.' I do not think so. At the time that the Respondent sent the £1000 down, the whole thing was alive and flourishing, and that £1000 was intended to be a payment in pursuance, and in furtherance and in performance of the promise which the Respondent had made, and had it not been for the vigour and determination of Mr. Jeffries it would have been actually used. Therefore, I come to the result that that was a corrupt promise, that it was partially carried out and stopped *in medio*, and that the £1000 which was sent in those two cheques was, strictly speaking, a sum of money paid in furtherance and in pursuance of the corrupt contract or promise which I say the Respondent had made. The Respondent, therefore, is in my opinion, so far affected by what occurred that he can no longer hold his seat."

Mr. Justice MELLOR, in his judgment, declared the election void.

As to the costs, he said: "I shall follow the rule which I Costs.

always act upon, unless there is some special reason to depart from it, and I see none here, therefore the costs will follow my decision and be borne by the Respondent. The only exception I desire to make is one not on account of its importance but on account of its significance. I certainly desire that the expenses of bringing down the man Bailey * as a witness should not be allowed. It is of no importance as regards the amount, but I wish to testify that I disapprove altogether of the employment of persons guilty of tricks of that description for the purpose of getting evidence. I therefore make that exception, that I disallow his costs."

* This man had come down and professed to be an agent of the Respondent, and as such had endeavoured to elicit from various publicans in the town what had taken place in their houses during the election.

CASE XXVIII.

BOROUGH OF STROUD.

BEFORE MR. BARON BRAMWELL, JULY 2, 1874.

Petitioners: Marling and others.

Respondent: Mr. Dorington.

Counsel for Petitioners: Mr. Serjeant Parry; Mr. Charles Russell, Q.C.; Mr. Anstie.

Agents: Messrs. Waterhouse and Winterbotham.

Counsel for Respondent: Mr. Serjeant Ballantine; Mr. A. L. Smith.

Agents: Messrs. White and Jones.

THE petition contained the usual allegations of corrupt practices, but did not pray the seat.

It was proved that at the previous election, which took place in February, and which had been declared void on petition,* the Respondent was an unsuccessful candidate, and that at that election considerable sums were sent by agents of the Respondent to voters who were away from home, in postage stamps, ostensibly as payment of their travelling expenses, but in many cases the sums sent were far beyond the mere railway expenses. These facts being indisputable the Respondent's counsel withdrew from the defence of the seat.

Mr. Baron BRAMWELL, in his judgment, declared the election void.

* Ante, p. 107.

Agreement as to paying travelling expenses on both sides.

As to the payment of travelling expenses he said as follows: "I must say that the arrangement that was made with respect to the payment of these travelling expenses, namely, the agreement that neither party would take exception to the other doing it, was really a most disastrous arrangement to be come to. In the first place I cannot strictly call it illegal, because I do not know that in any way the parties to it could be punished. I suppose it was competent to them without illegality to say they would not object to each other doing it, but it was an arrangement for the unpunished doing of an illegal act, because it is quite certain that the payment of these travelling expenses is a thing prohibited by the Act of Parliament.* The mischief of it was not limited to the mere illegality, but it was perfectly certain that the result of it would be that sums in excess of the travelling expenses would be paid.

Costs.

Costs followed the event.

* Representation of the People Act, 1867, s. 36, as to England, 31 & 32 Vict. c. 48, s. 25, as to Scotland, and 31 & 32 Vict. c. 49, s. 12, as to Ireland.

CASE XXIX.

BOROUGH OF STROUD.

BEFORE MR. BARON BRAMWELL, JULY 7, 1874.

Petitioners: Baynes and others.

Respondent: Mr. A. J. Stanton.

Counsel for Petitioners: Mr. Serjeant Ballantine; Mr. A. L. Smith.

Agents: Messrs. White and Jones.

Counsel for Respondent: Mr. Serjeant Parry; Mr. Anstie.

Agents: Messrs. Waterhouse and Winterbotham.

THE petition contained the usual allegations of corrupt practices, but did not pray the seat.

The facts of the case sufficiently appear from the judgment.

Mr. Baron BRAMWELL, in his judgment, declared the Respondent duly elected.

As to the facts of the case, he said as follows:—

"This case is reduced, by the concession of the Petitioners' counsel, to what arises from the workmen having been paid on the polling days of the elections * held in February and May. I take the facts to be clear. In the first place, this fact is clear—

Payment of wages, when bribery.

* The several elections referred to were (1), the election held in January, 1874, in consequence of the death of one of the members, Mr. Winterbotham, in December, 1873, (2) the general election, which was held in February, 1874, and (3) an election held in May, 1874, in consequence of the election in February being petitioned against and declared void.

that up to and inclusive of the day on which the January election was held, all the days on which the men did not work were days for which they were not paid. Whether it arose from the mill stopping from a break down, or from its being a holiday, such as Christmas Day, Whit Monday, or Good Friday, or from the men thinking fit to absent themselves and take holiday, on all these occasions, including the polling days, if the men did not work they did not get paid. That is one clear fact. The next fact is —that in all the mills that practice continued up to and inclusive of the January election. There is no evidence that anyone was paid at the January election except in the case I am going to mention. After the January election, and after it was known that the February election would come on, the men at Ford's mill were paid for the January polling day. Not only in Ford's mill, but at Marling's, Strachan's, and several others, they were paid for the polling day in February, and the polling day in May, but there is no mill except Ford's at which they were paid in respect of the January election. These facts are beyond dispute. The facts, therefore, are, that in Ford's mill there was the particular exception I have mentioned, but in that mill and in several others a new practice has been introduced of paying men for a day on which they did not work, that day being the polling day, when the mills were closed. It was argued that that is a bribe within the meaning of the Corrupt Practices Act, 1854, and that really is the simple question I have to decide. It is simple enough as far as the statement of facts goes, but it may involve some considerations of difficulty. Now I will read the words of the Act which bear upon the first way in which my brother Ballantine has put it to me; they are these:—'Every person who shall promise any money to any voter in order to induce any voter to vote or refrain from voting shall be guilty of bribery.' I am called upon to find that these millowners, some of whom are undoubtedly agents of the Respondent, promised money to voters in order to 'induce them to vote or refrain from voting.' It appears to me that there are two insuperable difficulties in the way of my doing so, and one of them is that I see no promise at all. We must limit ourselves to the case in May, as the Respondent was not a candidate at the February election,

and, therefore, he is not affected by anything that took place before May, except as it casts a light on the May proceedings. Now my brother Ballantine very ingeniously argued it in this way; he said that by paying the men in February the millowners in effect promised the men that they would similarly pay them upon the next occasion, that the payment in February is under the circumstances evidence of a promise that when the next election was held they would do the same thing again. That is the argument. Now if that were so, I think it would be within the statute, because, although the bribery must be committed at the election, and the promise must be at the election, yet it has been held,* and properly held, that it does not mean at the very moment when the polling is going on, but it means at such a time as makes the bribery operative on the election. To take an extreme case, if the Respondent himself had said to any voter, 'Here is £5 for you if you will promise to vote for me when I am a candidate,' if he had not come forward for the next ten years it would still have been within the Act of Parliament. Therefore, if the millowners who were agents of the Respondent in May had said in effect in February, 'If you vote upon my side in May I will pay a day's wages when you do not do a day's work,' it would have been within the Act of Parliament. But is there any evidence of such a promise as that? To my mind there is none. It is a sound rule of law and of good sense that you have no right to draw a general conclusion from a particular instance. Take, for example, the fact of a man having signed another man's name once, that is no evidence of an authority to sign it generally, but if he has signed it many times with the sanction of the person whose name has been signed, then there is evidence of a general authority. I can readily understand that if this practice had gone on for many elections, and money had been paid when the men did not work, a workman would be entitled to say, 'Why, you hired me on those terms; it was always the practice at your mill that if the mill was shut upon that day, and I did no work, nevertheless that I should be paid for it.' But one instance of the sort does not warrant any such conclusion. It was a matter of

* Per Keogh, J., Sligo, vol. i. 302.

grace in February, when it was paid, and it was equally a matter of grace dependent upon the good pleasure of the millowners at the time when they actually paid it in May. But there is another difficulty in the way, and that is this. The promise struck out by the Act of Parliament must not only be a promise of money to voters, but it must be a promise to voters, 'in order to induce any voter to vote or refrain from voting.' Is it possible to say that what was done here was done 'in order to induce any voter to vote or refrain from voting?' I think not. Very probably, however, there was in the minds of these masters who paid in this way some notion that it would not have an unfavourable effect upon the persons who received this day's wages. They must have had a notion that it would do them some good; they could not have thought that it would have a neutral effect. But the Act of Parliament does not deal with that case. The Act does not say that liberal conduct towards your men, or such a thing as I suggested—for instance, the putting up of a drinking fountain, or what not,—although it may be done very much to influence voters, is an act of bribery. I do not think that it was the intention of the Legislature to prevent the doing of any act liberal and good in itself. As, for instance, if a master said to his men, 'If you choose to make a holiday of this day you shall not lose money by it, whatever your colour, go out and take your holiday, and you shall be paid your day's wages all the same,' I doubt if there had been any antecedent promise of that kind whether it would come within the meaning of the Act. I do not think the Legislature intended to prohibit that; it intended to prohibit acts done with the specific object of influencing the mind of the individual voter to whom they had relation by the particular temptation held out to him, but it did not intend to prevent an act being done to a person, kind and good in itself, merely because it had a tendency to make that person favourable to the persons doing it.

Effect of the word "corruptly."

"But further, the Act says, 'shall *corruptly* do any such act.' Now, it would be impossible to find that it was *corruptly* done, unless there had been some previous engagement or something else to make that wrong which otherwise would be right. I rather think that word 'corruptly' would not apply to any case

where the payment was merely on account of the voting, unless there was some other reason for giving the money. For instance, such a thing as this might happen, if a man voted and got turned out of his situation and went to anybody for charity, and a man said, 'I am sorry for you, here is a sovereign,' that would not be a corrupt payment, though it might be said to have been given on account of the man having voted a particular way. Nevertheless, in almost every case where a payment is made in consequence of a voter having voted, it would be a corrupt giving unless some reason such as I have suggested could be given."

As to costs, he said as follows :—

Costs.

"Although I have no doubt that what was done is not within the Act of Parliament, yet I believe that it was done to get the good will of the workmen who were affected by it, and I think it is somewhat a mischievous practice. It is a practice to be deprecated, and one which had better not be observed. It would be better, if the masters have a mind to do an act of benevolence and kindness to their workmen, to fix upon some day which is not a polling day. There is also another matter to which I wish to call attention. It was proved that five men were given free railway tickets, or that their fares were paid for them. That has not been traced to the Respondent, and, if it had been, I do not think it would have affected his seat. My brother MELLOR ruled at Bolton* that it would not, and I am of opinion that it would not. But I am also of opinion that it is a thing which the Act of Parliament† prohibits. The reason I have made these two last observations is, that I think the Respondent's friends have to a very considerable extent brought this inquiry upon themselves. I think that it is an inquiry that the Petitioners were well justified in entering into, and consequently I think that they ought not to pay the Respondent's costs, but that each party should pay his own."

* Ante, pp. 144—150.

† See p. 180, note.

CASE XXX.

BOROUGH OF ATHLONE.

BEFORE THE COURT OF COMMON PLEAS, DUBLIN, APRIL 24, 1874.

Petitioner: Edward Sheil.

Respondent: John James Ennis.

Counsel for Petitioner: Mr. Serjeant Armstrong; Mr. David Fitzgerald.

Counsel for Respondent: Mr. Heron, Q.C.; Mr. M'Dermot.

Counsel for Returning Officer: Mr. Gerald Fitzgibbon, Q.C.; Mr. Nicholls.

THE petition was as follows:—

1. Your Petitioner is a person who claims to have a right to have been solely returned at the above election.

2. The said election was holden on the 2nd and 5th days of February, 1874, when your Petitioner and John James Ennis, Esq., were the only candidates, and the returning officer has made a return of the writ under which the said election was holden in the words and figures following, that is to say,

> "I certify that John James Ennis and Edward Sheil each obtained 140 votes, and I not being a registered elector of the borough of Athlone had no authority to give any deciding vote. So answers
>
> "WALTER NUGENT, Sheriff."

3. Your Petitioner complains of the said return, and insists that in reality he had a majority of legal votes, and that he alone ought to have been returned by the said returning officer, and that he

ought to have been declared duly elected member for the said borough of Athlone.

4. The said alleged equality of votes was arrived at by means of an erroneous decision of the said returning-officer in reference to twenty-one votes given for your Petitioner, which were rejected by the said returning officer.

5. It appeared, in the course of the counting of the votes, that certain of the voters who voted for your Petitioner, had placed their cross immediately after and opposite your Petitioner's name in the ballot-paper, and in the compartment or division of the said ballot-paper in which your Petitioner's name was printed, but not in a space outside the said compartment, and separated therefrom by a vertical line. Thirteen votes so given for your Petitioner were rejected by the said returning officer. It also appeared that certain other of the voters who had voted for your Petitioner had placed their cross immediately before and opposite your Petitioner's name on the ballot-paper; eight votes that were so given for your Petitioner were rejected by the said returning officer, and your Petitioner submits that the said votes should have been counted for him.

6. The rejection of the said thirteen and eight ballot-papers was objected to by your Petitioner's agent, who attended the counting of the votes, and his objections duly endorsed upon the said ballot-papers by the said returning officer.

7. Throughout the counting of the said votes, your Petitioner's agent insisted that the said returning officer should not reject any of the ballot-papers so marked; and after the returning officer had rejected most of the ballot-papers so marked, he said he thought he had made a mistake in doing so, and was sorry he had done so, and would reject no more ballot-papers on that ground. He thereupon proceeded with the counting, and allowed such other ballot-papers similarly marked as came up during the rest of the counting. The number he so allowed was four, of which one was marked for your Petitioner, and three for the Respondent.

8. After the counting your Petitioner's agent again called upon him to allow the said thirteen and eight votes for your Petitioner which he had rejected. The returning officer thereupon appealed to his assessor to know if he might do so, but the Respondent's

agent objected and protested against his so doing, and the sheriff's assessor thereupon advised him that having once decided against the said votes, and endorsed his rejection thereof upon the ballot-papers he could not subsequently alter his ruling in that respect. Thereupon the returning officer said that at any rate he would be uniform in rejecting them, and he thereupon sought out the said four ballot-papers which he had previously allowed and rejected them, and endorsed his rejection thereof thereupon.

9. Your Petitioner submits that the said returning officer improperly and illegally rejected the said thirteen and eight votes for your Petitioner, the ballot-papers in relation to which were marked as aforesaid, and that he ought to have allowed the same.

Wherefore your Petitioner prays that it may be determined that the said John James Ennis was not duly returned, and that your Petitioner alone ought to have been returned and declared duly elected member for the said borough of Athlone; and that the said Walter Nugent be deemed a Respondent hereto; and that he or the said John James Ennis be ordered to pay the costs of this petition and the proceedings thereon.

(Signed) EDWARD SHEIL.

Pursuant to an order of Mr. Justice LAWSON, the petition was turned into a special case in which the facts, so far as relates to the Petitioner's case, were set out as stated in the petition. The following additional facts were also stated, as follows:—

The number of ballot-papers delivered to electors in the aggregate was 315. On examination by the sheriff two ballot-papers were found not to be marked by a cross, or any mark to indicate for whom the elector intended to vote; eight were marked with a cross opposite, but on the left-hand side of the Petitioner's name, thirteen were marked with a cross opposite Petitioner's name, and on the right-hand side, but in the same column or compartment of the ballot-papers with Petitioner's name, one ballot-paper, marked for the Petitioner, had a name written on it. Eight ballot-papers were marked with a cross opposite the Respondent's name, and on the right-hand side, but in the same column or compartment as the Respondent's name. One ballot-

paper was marked with a cross opposite the Respondent's name, but on the left hand side, and two ballot-papers, marked for the Respondent, had a name written on them.

These thirty-five ballot-papers the sheriff rejected, and there then remained one hundred and forty votes for each candidate.

On the hearing of the special case, all the ballot-papers were ordered to be produced, to be inspected by the court, if necessary; as also the sheriff's report, made pursuant to rule 36 of the Ballot Act; and the court was to be at liberty to draw inferences of fact. The questions for the opinion of the court were as follows:—

(*a*) Whether the sheriff was right in rejecting any, and which, of the said ballot-papers.

(*b*) Whether any, and which, of the ballot-papers so rejected should have been counted for the Petitioner.

(*c*) Whether any, and which, of the ballot-papers so rejected should have been counted for the Respondent.

(*d*) The Petitioner, or the said John James Ennis, to be declared entitled to be returned as, and to be, member of Parliament for the said borough, according to the opinion of the court, upon the foregoing questions, or that the return made by the said returning-officer be declared a good and valid return; and the costs of said petition and proceedings thereon to be paid by each of said parties hereto, or to abide such other order in reference thereto as the court shall direct.

The Lord Chief Justice MONAHAN delivered the judgment of the court as follows:—

"As a matter of fact we entertain no doubt at all, that, under the true construction of this Act of Parliament, the votes on the right-hand side of the ballot-papers ought to have been received by the sheriff, and that means that Mr. Sheil ought to have a legal majority; and, therefore, we so record that in our opinion he ought to have been declared duly elected. With regard to the question of costs, we wish to take time to consider the matter. We don't decide the question as to the votes on the left-hand side, and we will specially state in our certificate that we don't think it necessary to consider whether the votes on the left-hand side are

good or bad, because not counting them, and merely deciding on the right-hand votes gives Mr. Sheil a majority, and, therefore, the counting of the left-hand votes would not alter the matter."

Costs.

As to costs he subsequently said:—"In this matter, which stood over to consider what should be done with the costs, the facts of the case are these. It appears that the sheriff, as far as we can see, of his own instance, without either party insisting on it, ruled that all these votes (those marked on the right-hand side) should be rejected. That being so, we are of opinion there was no misconduct by either party. We think it a misfortune, but that, under the circumstances, the proper course is that each party must pay his own costs."

CASE XXXI.

COUNTY OF MAYO.

BEFORE THE COURT OF COMMON PLEAS, DUBLIN, MAY 4, 1874.

Petitioner: Sir George C. O'Donel.

Respondents: George Eakins Browne and Thomas Tighe.

Counsel for Petitioners: Mr. Murphy, Q.C.; Mr. M'Dermott.

Counsel for Respondents: Mr. Carleton, Q.C.; Mr. Jordan.

Counsel for the Returning Officer: Mr. Beytagh, Q.C.; Mr. Trench.

The petition was as follows:—

1. Your Petitioner was a candidate at the above election.

2. Your Petitioner states that the election was holden on the 6th day of February, 1874, and your Petitioner, George Eakins Browne, and Thomas Tighe were candidates at said election.

3. The time appointed by the returning officer of the said county, that is to say, the high sheriff of the said county, Joseph Pratt, Esq., for holding the said election was between the hours of 11 o'clock in the forenoon, and one o'clock in the afternoon of the said 6th day of February, and the place appointed by the said returning officer for holding the said election was the grand jury room of the county court house of Mayo, in Castlebar.

4. Your Petitioner was duly nominated in writing at the time and place so appointed for holding the said election, as a candidate to serve in Parliament for the said county.

5. The said writing, hereinafter called "the nomination paper," was subscribed by two registered electors of the said

county as proposer and seconder of your Petitioner, and by eight others, registered electors of the said county, as assenting to the nomination of your Petitioner, and the said nomination paper subscribed as aforesaid was during the time appointed for the said election, duly delivered to the said returning officer.

6. Your Petitioner was in all respects duly nominated according to the provisions of the 35 & 36 Vict. c. 33, and no objection was made to the nomination paper of your Petitioner by the said returning officer, or any other person before the expiration of the time appointed for the said election, or within one hour afterwards.

7. The said George Eakins Browne and Thomas Tighe were also duly nominated as candidates for election to serve in Parliament for the said county of Mayo, whereby the said election became a contested election within the meaning of the said statute.

8. Thereupon it became and was the duty of the said returning officer after the expiration of the said appointed time to adjourn the said election, and to appoint and give public notice of a day upon which the poll for the said election would be taken.

9. After the hour of one o'clock in the afternoon of the said 6th of February, the nomination of your Petitioner was objected to on behalf of the said George Eakins Browne and Thomas Tighe by their respective conducting agents and by notices in writing served by the said agents on behalf of the said George Eakins Browne and Thomas Tighe respectively, on the alleged grounds that your Petitioner had not appointed an expense agent in writing, and given notice to the returning officer thereof in writing, on or before the day of nomination, as by said notices will appear.

10. Before the declaration of the said returning officer next hereinafter mentioned, your Petitioner's conducting agent, by a written notice delivered to the said returning officer, demanded to have a day fixed for taking the poll at said election in pursuance of the said statute.

11. Notwithstanding the premises the said returning officer in violation of his duty in that behalf and in derogation of the rights of your Petitioner and of the electors of the said county,

and contrary to the statute, refused and denied a poll, and declared the said George Eakins Browne and the said Thomas Tighe to be elected members to serve for the said county in Parliament, and certified under his hand by indorsement on the writ of election the names of the said George Eakins Browne and Thomas Tighe as the members elected for the said county of Mayo, and returned said writ so endorsed to the clerk of the Crown and Hanaper in Ireland, without any poll having been had.

12. On the 6th day of February, 1874, the day of the nomination as aforesaid, your Petitioner duly appointed Patrick Gibbons, of Newport, in the county of Mayo, his agent for the payment of election expenses for the said election, and gave notice thereof in writing to the returning officer at 25 minutes past two o'clock, p.m., on the said 6th day of February.

Wherefore your Petitioner prays that it may be declared that the said George Eakins Browne and Thomas Tighe were not duly elected or returned, and that the said election was void, and that the said returning officer, Joseph Pratt, may be deemed a Respondent to this petition, and that the said Joseph Pratt, the said George Eakins Browne, and said Thomas Tighe, or some or one of them, may be ordered to pay the costs of this petition to your Petitioner.

(Signed) GEORGE C. O'DONEL.

Pursuant to an order of Mr. Justice LAWSON, the petition was turned into a special case, in which the facts were set out as stated in the petition.

The questions for the opinion of the court were as follows:—

(1). Whether upon the facts above stated the Petitioner was entitled to a poll.

(2). Whether, if the Petitioner was so entitled, the election and return were null and void.

The court to make such order as to costs as it shall deem proper.

The learned judges said as follows:—

Mr. Justice MORRIS:—In this case none of the court, I believe (I can certainly say so for myself) have a shadow of doubt about this case, or have had such from the time we heard it raised; and for my part it appears to me almost inconceivable how such a decision could have been arrived at by any person. It appears, however, that this gentleman, the sheriff, who I presume is a country gentleman, was not assisted by an assessor; and I may add, parenthetically, that when sheriffs allow themselves to be influenced, forced, I should say, into making such ludicrous decisions as this, it ought to be a caution to them to fortify themselves with the advice and assistance of counsel. This case comes very little short of what it was opened to us by Mr. M'Dermott as an outrage upon the law of election. A party is put in nomination; the sheriff has the fullest power under the Act of Parliament of investigating his nomination paper, and seeing that he was properly nominated and seconded, and there his control ends; he has only to go on with the election. The suggestion made here is that he would be open to any remarks made in the town as to whether the candidate had committed bribery, and I think that would be a most irrelevant inquiry. Cases were cited which had no more bearing on the question before us than the case of the six carpenters* would have had; as to whether this gentleman (the Petitioner) had paid to the sheriff a sum of money for the expenses of the election, or whether it was a mere statement that he did so; in my opinion a most irrelevant and idle inquiry; for if he paid it ten times over it would have just as much to say to the case as if (to use Mr. M'Dermott's illustration) he wore a white hat, or had fur on his coat. In this case I have no doubt. The rest of the court will express their opinions individually—that the election must be declared null and void; and I can only add, that I really think such a thing could not occur in any other part of Ireland than in Mayo.

Mr. Justice KEOGH:—I am entirely of the same opinion. The case would be serious if it were not so intensely ludicrous, that it is impossible to look upon it except in a ludicrous aspect. The case before us states that all the three persons were duly nominated. Every one of the three was entitled to a poll. An objection was then made that the Petitioner had not appointed an

* 8 Coke, 146 a; S. C., 1 Smith's L. C. ed. 5, p. 128.

expense agent. That, however, had nothing to do with the duty of the sheriff in appointing a day for a poll. Even supposing it had, at twenty-five minutes past two an expense agent was duly nominated by the Petitioner. The ground was then shifted, and the agents for the Respondents said to the sheriff, "We object to your receiving a nomination of an expense agent, for the day is over;" and in five minutes afterwards, at half-past two, the sheriff, acting under the advice of counsel for the Respondents, proceeded to declare them duly elected. That is really the ludicrous part of this case; but suppose it was tolerated, there is no reason why every sheriff in Ireland should not do the same, and if so, it might happen that every member for Ireland would be returned by the sheriffs. These two gentlemen have at present as much right to be members for the county of Mayo, as any man who hears me; yet if there were a close division in the House of Commons on an important political question, they might decide who should be the Prime Minister for the next five years. I do really concur with my brother Morris, that in no other part of Ireland—I may go further, and say, in no other part of the British dominions—could such a thing have occurred as has happened in this case.

The Lord Chief Justice MONAHAN:—I am as anxious as the other members of the court to express my opinion on this case; not that I have the slightest doubt upon it. It appears that according to the Act of Parliament it is the duty of a person coming forward as a candidate to appoint an expense agent on the day of election; but the Act does not go on to say that the election is rendered void if this expense agent be not appointed. It merely says that the party who may pay money for the expenses of the election, without having an expense agent, will be guilty of a misdemeanour; but that has nothing whatever to do with the duty of the sheriff in appointing a day for a poll. Without any shadow of doubt, all these three gentlemen were duly nominated; it was the duty of the sheriff to appoint a day for a poll, and his not having done so, renders his return null and void. With respect to the costs of the petition, it appears that the agents of the Respondents insisted on the sheriff acting as he did, and they must, therefore, pay all the costs of the petition.

CASE XXXII.

BOROUGH OF GALWAY.

BEFORE MR. JUSTICE LAWSON, MAY 18, 1874.

Petitioner: Mr. Pierce Joyce.

Respondent: Mr. F. H. O'Donnell.

Counsel for Petitioner: Mr. Serjeant Armstrong; Mr. C. O'Flaherty.

Agents: Messrs. Davis and Montford.

Counsel for Respondent: Mr. Fitzgibbon, Q.C.; Dr. Houston.

Agent: Mr. Kavanagh.

THE petition contained the usual allegations of corrupt practices, and also an allegation, "that the Respondent personally engaged at the said election as a canvasser or agent for the management and purposes of the said election a certain person, that is to say, the Most Reverend John McEvilly, Roman Catholic Bishop of Galway, he, the Respondent, knowing that the said bishop had within seven years previous to such engagement and such election been reported guilty of a corrupt practice, that is to say of undue influence, by the report of a judge on an election petition under the Parl. El. Act., 1868, whereby the election and return of the Respondent were and are null and void."

It appeared that, previous to, and in anticipation of the polling day a system of intimidation was organized by the Respondent and his agents by threats and mob violence to unduly influence voters, and that such system was on the polling day carried out with the knowledge and consent of the Respondent. Consequently, the election was declared void.

In the course of the case,

Engagement of scheduled person as agent.

It was proved that upon the trial of the Galway County Election petition in May, 1872, Dr. McEvilly, Bishop of Galway, was reported by Mr. Justice KEOGH as guilty of corrupt practices, and that the Respondent was aware of this fact. Shortly before the present election the Respondent called upon the bishop, and he (the bishop) then said to the respondent that his hands were tied by Mr. Justice KEOGH'S report, and that he could have no hand, act, or part in the election. At the same time the bishop made no concealment from the Respondent that he entirely approved his candidature. The bishop and clergy reside together, and have a common table in the College House, and a few days after this visit of the Respondent to the bishop, the clergy met at the College House and formally adopted the Respondent as the candidate whom they would support. Immediately before this meeting the bishop, knowing what was about to take place, withdrew from the room in order not to be present at the proceeding. On March 8th another meeting was held at College House, the bishop, the clergy, and the Respondent all being present, and it was then arranged that the clergy should on the next day go out to canvass with the Respondent, which they accordingly did, and the canvass was prosecuted for some days. It was proved that this canvassing was not done by the express order of the bishop, but it was clear that he was aware and approved of what they were doing.

It was also proved that some weeks before this, namely, on February 16, 1874, a most libellous and malignant letter was written to Mr. Joyce, the unsuccessful candidate, by one of the clergy of the College House. The avowed object of this letter was to drive Mr. Joyce from the field, and to put an end to his candidature. This letter, before it was sent, was shown to and approved by the bishop, who in fact punctuated it, and in some passages altered its phraseology in order to give point and pungency to some of the insulting and libellous matters contained in it. It was clear that the writer of this letter, Father Dooley, was an agent of the Respondent, but it was also clear that it was without the Respondent's knowledge or authority that this letter was written and submitted to and corrected by the bishop.

Under the above circumstances taken together, it was submitted by the Petitioner's counsel that it ought to be held that the Respondent had been guilty within the meaning of the Parl. El. Act, 1868, s. 44, of personally engaging as an agent for the management of the election a person who within seven years previous to such engagement had been reported guilty of a corrupt practice, and that the Respondent's election ought therefore to be declared void.

Mr. Justice LAWSON said as to this in his judgment: "The question is whether under these circumstances the Respondent can be held to have 'personally engaged' the bishop as his 'agent for the management of his election.' There is of course no actual engagement pretended, as both parties, both the bishop and the Respondent, knew of the disability and of the consequent disqualification, and both certainly desired not to incur the penalty, but Mr. Serjeant Armstrong in his reply called upon me to infer from all the circumstances proved in this case that the bishop did, substantially and really, act as an agent for the management of the Respondent's election, and so act with the Respondent's knowledge and approval. Now what are the matters upon which I am asked to draw that conclusion?

After recapitulating the facts of the case as above stated, he continued as follows:—"I consider it would be impossible to hold that the bishop's silence or his non-prohibition of the canvassing (which had been arranged at the meeting on March 8) would make him an agent. I agree to the full that the bishop was, as Serjeant Armstrong described it, 'at the bottom' of the whole movement, that he secretly approved of all that was being done, and that if he had had the slightest wish that the canvass by the clergy should not take place it would not have taken place. And I go further than that, I say that the bishop perfectly well knew that, when his vicar-general and his other clergy appeared in the streets to canvass for the Respondent, the public would understand, and, indeed, were intended to understand, that the proceeding was sanctioned by the bishop. But I consider it to be impossible for me, in applying the 44th section of this Act of Parliament, which creates a disqualification, and is penal in its nature, to bring any person within that penalty upon mere sus-

:ion. I admit that it may be contended, that if the bishop iesired to act up to the spirit of the law, and not merely to obey its letter, he should have desired his clergy not to become agents for Mr. O'Donnell; but I, as a judge, cannot condemn any man for having violated the spirit of the law, unless he has also actually broken the law; and in order to do that, he must do some act to constitute him an agent for the purposes of the election. The learned serjeant, however, in his powerful reply, argued that the bishop's revising and approving of the letter to Mr. Joyce, of the 16th of February, written by his vicar-general, Mr. Dooley, was such an act; that it was written with a view to the election, and in order to deter one of the candidates from persevering in his canvass; and he insists that, that having been done by the bishop in the interests of the other candidate, that is sufficient to constitute him an agent. Now, the judges have always been careful (and I think rightly) to avoid giving an actual and precise definition of the word 'agent,' because in these election matters, if there were an exact legal definition of the term, I dare say persons would be always trying to evade it, and though they were doing improper acts, not to bring themselves within that definition. I think Mr. Justice GROVE has given an admirable definition or description of it in a late case,* in which he says, 'The candidate is responsible generally for all those who, to his knowledge, carried on the purpose of promoting his election.' The question in the matter of the writing of this letter is, whether the bishop did, to the knowledge of the candidate, 'carry on the purpose of promoting his election.'

"Now, the argument founded upon this letter is that it is an electioneering letter, written in the interest of the Respondent in order to put an end to Mr. Joyce's candidature. I agree that such was at least part of its purpose, but the difficulty I feel is that what the bishop did was done without the Respondent's knowledge or authority. There is no doubt that Father Dooley was an agent of the Respondent, but how can I hold that if a man's agent in doing a particular act for which his principal would be responsible is aided by another agent called in by himself and without the knowledge of that principal, that other person so

* Taunton, ante, p. 74.

called in thereby becomes an agent? It is further argued that the Respondent had publicly stated that he was put forward by the bishop and clergy. That certainly implies that the bishop was his supporter, as undoubtedly he was; but it does not follow from that that the bishop had therefore made himself the Respondent's agent. It may be said that I am dealing with this part of the case upon very technical grounds, and perhaps I am, but I do not, sitting here as a judge, feel justified in attaching a penal disqualification to a person, except upon clear and conclusive evidence."

Mr. Justice LAWSON, in his judgment, declared the election void, on account of intimidation by the Respondent and his agents.

As to spiritual undue influence, he said :—

Spiritual undue influence.

"Undue influence, like other frauds of which it is only a species, must be established by evidence, and cannot be arrived at by conjecture. I need not refer to authorities to establish what in point of law constitutes undue spiritual influence. The judgments of Mr. Justice KEOGH in the Galway cases,* and that of Mr. Justice FITZGERALD in the Longford case,† leave nothing to be said as to the law of the matter."

Intimidation general, or by agent.

As to undue influence, he said :—"Mr. Fitzgibbon referred me to the Stafford case,‡ in which Mr. Justice BLACKBURN lays down the law with respect to the two kinds of intimidation which are to be carefully distinguished from each other. One is general intimidation not brought home to the candidate or his agents, which, although they had nothing to do with it, may defeat an election; the other kind is intimidation brought home to the candidate and his agents."

Costs.

Costs followed the event.

* Vol. i. p. 305, and ante, p. 57. † Ante, p. 14.

‡ Vol. i. pp. 229, 234.

CASE XXXIII.

BOROUGH OF DROGHEDA.

Before Mr. Justice Barry, May 29, 1874.

Petitioners: Morton and others.

Respondents: Dr. W. H. O'Leary, and Mr. Daly, Returning Officer.

Counsel for Petitioners: Mr. Heron, Q.C.; Mr. Fitzgibbon, Q.C.; Mr. Nicholls.

Counsel for Respondent O'Leary: Mr. Porter, Q.C.; Mr. Boyd; Mr. Killeen.

Counsel for Respondent Daly: Mr. Falconer, Q.C.

The petition contained the usual allegations of corrupt practices, and also allegations* as to the way in which the election was conducted, and prayed the seat for the unsuccessful candidate.

Evidence was given to show that there had been at the election an organised determination between those who had the conduct of the election and the Respondent or his agents to set at utter defiance the principles of secrecy sought to be enforced by the Ballot Act, and to carry on the election with the same publicity, and with the consequences attendant on that publicity, as existed before the passing of the Ballot Act; but this was not proved. What was actually proved to have taken place appears from the Special Case.

All the charges of corrupt practices were withdrawn.

In the course of the case,

It was proved that in consequence of some unforeseen accident

Consequences of not opening

* The nature of these allegations appear from the Special Case set out below, p. 203.

the poll at the proper time.

the polling stations were not opened at the statutory hour of 8 A.M., and, in fact, no votes were (or could be) received until 8.45 A.M. It was clear that the fact of not opening the polling stations until three quarters of an hour after the appointed time had no effect whatever upon the result of the election, and that not a single voter was in consequence prevented from voting; in fact, the whole constituency was almost entirely polled out before the poll was closed.

It was argued, however, by the Petitioners' counsel that the mere fact that the poll was not opened at the statutory time was sufficient to warrant the election being declared void. In support of this argument cases were cited* where elections had been held void in consequence of the poll being closed too soon. The recent decision of Grove, J., in the Hackney † case was also cited.

Mr. Justice BARRY said as to this in his judgment: "Is the election to be declared invalid by reason of the polling stations being substantially not open until a quarter to nine o'clock? Being satisfied, as I am, that this fact had not the remotest effect upon the result of the election; being satisfied that the constituency was polled out, so to speak, in a manner, if not unusual, at least remarkable; being satisfied that no single voter was disappointed in voting, or was induced or caused to vote differently from what he otherwise would have done, by reason of this error of time, I will not declare the election invalid by reason of the irregularity that the booths were not opened, strictly speaking, at eight o'clock. I think the cases referred to by the Petitioners stand each upon a very different footing. I think that the closing of the booths an hour or two before the proper time is a very different question. At all events, it does appear to me that in all these cases the element of common sense and the reason of the thing has largely to enter into the consideration of the tribunal."

Subsequently in his final judgment he added as follows as to this matter:—"I have seen a suggestion that my decision in this case is a dissent on my part from the decision of Mr. Justice Grove in the Hackney case. I beg leave to disclaim any such dissent. There is no resemblance between the two cases. In that case the most ordinary and necessary rules of an election

* Limerick, P. & K. 373; Harwich, 1 P. R. & D. 314. † Ante, p. 81.

were violated. Of the 41,000 electors of Hackney, only about two-fifths could have voted, two of the polling places were closed all day, and three others for part of the day. In that state of things it was proposed to the learned Judge that he should enter on a sort of speculation or conjectural scrutiny, in order to ascertain how the election would have resulted if everything had been regular, and he most properly declined such an inquiry. But in the case now before me, it was not proved, it was not even suggested, that a single voter had been disappointed in voting by reason of the delay. The cases where election committees have set aside elections under similar circumstances are referred to in Bushby's "Election Manual,"* but to hold an election void under such circumstances as the present would be to put it in the power of any careless or corrupt presiding officer in any one polling station to nullify the solemn act of the largest constituency in the Kingdom."

At the close of the Petitioner's case the scrutiny was gone into, but the number of votes struck off was not sufficient to place the unsuccessful candidate in a majority.

Mr. Justice BARRY, in his judgment, stated that, as the scrutiny had failed in establishing the Petitioners' claim to the seat, he should submit a Special Case for the decision of the Court of Common Pleas, setting out the facts which had been proved.

The Special Case was as follows:—

The trial of this election petition before me was terminated yesterday, and I request the opinion of the Court of Common Pleas upon the following case.

The facts, as proved in evidence, are, for the purposes of the determination of the question upon which the opinion of the Court is requested, to be assumed to be as hereinafter stated. At the election in February last there were two candidates, Mr. Whitworth and Dr. O'Leary. Dr. O'Leary was returned by a majority of ten, the numbers being 284 and 274. There were seven polling stations, viz. the court-house, two rooms upstairs in the court-house besides, and apartments in four private houses hired for the

* Fourth Edition, p. 70.

purpose. It is with reference to the four polling stations in these private houses that the controversy mainly arises. The polling stations were on the first or drawing-room floor of the houses.

This first floor comprised two rooms, between which there was no internal communication, but in order to pass from one to the other, a person should cross a small landing upon which the doors of the two rooms stood at right angles to, and at a small distance from each other. I annex to this case four maps representing the position and measurements of the rooms and landings.

I visited and inspected these rooms myself on two occasions during the trial.

The presiding officer, with the authorised agents, sat in the front room, out of view of the back room or the landing. In the back room was placed a table with a pencil on it, upon which the voter might mark his ballot-paper. When the voter received his ballot-paper in the front room he was ordered by the presiding officer to proceed to the back room to mark his paper. The voter having done so, returned to the front room, and placed his paper in the ballot-box there. On the landing between the two rooms was stationed a policeman, who was instructed to prevent more than one voter at a time from entering either room, to prevent any one from interfering with the voter, and to preserve order; but they received no instructions as to preventing voters while crossing the landing from showing their mark on the ballot-paper, or as to how to act in case of such an occurrence. All the arrangements of, and respecting the polling stations, and for the conduct of the election generally, were made by the returning officer in perfect good faith, under the guidance of an assessor, and with the bonâ fide intention of acting according to the Ballot Act.

A habit prevailed during the election of what was termed "bringing up voters," namely, a committee man or other friend (unpaid) of the candidates, accompanied the voter up to the polling-place, sometimes left the voter at the street door, sometimes went up the stairs with him, sometimes left him as soon as he arrived up the stairs, and sometimes waited until he had voted, and then accompanied him away from the station.

This habit prevailed at all the seven stations.

The habit of accompanying the voter up stairs, and waiting until he voted, was more generally practised by Dr. O'Leary's friends than by Mr. Whitworth's.

This practice, in my opinion, had no reference to the peculiar arrangement of the four polling stations in the private houses with a view to any violation of the secrecy of the ballot, and was merely a following out of the old tally-room practice.

The result, however, of this practice, and of the aforesaid polling arrangements, was, that it frequently happened that whilst a voter in the act of voting was passing from the front to the back room, and from the back to front room, there were standing at the head of the staircase, within a few feet of the voter, at least three persons, namely, the policeman, the committee-man, or friend, who brought up the voter, and another elector, waiting for his time to vote.

To these three persons the voter, after marking his ballot-paper, might, in walking across the landing, show the mark on his ballot-paper, and there was nothing to check or prevent his doing so, unless the policeman in the exercise of his discretion thought proper to do so, by reporting the matter to the presiding officer, or by some other means.

No evidence whatever was given that on any occasion the mark on the paper was so shown to, or seen by, any of the said persons, and on the evidence I am of opinion that no mark was so shown or seen.

On one occasion a voter was brought to the station by one of Dr. O'Leary's committee-men, and having gone into the front room, came out with his ballot-paper whilst these were on the landing or stairs, viz. the policeman, the said committee-man, and a respectable gentleman, avowedly a sympathiser with Mr. Whitworth, waiting to vote. The voter, without addressing himself to any one of them in particular, asked what he was to do with the paper, the said committee-man replied, "You have to go into that room" (pointing to the back room) "and mark the paper as you have been told, or as it has been shown," referring either to the directions given in the front room by the presiding officer, or to some instructions previously given to the voters as to the mode of voting. On another occasion a voter, having come out of the

front room with his paper, asked a policeman, in the presence of a third person, how he was to put his mark on the paper, and the policeman refused to give him any information, and referred him to the person in the front room. On one or two occasions the voter was coming out of the back room without folding his paper, and the policeman, without seeing the mark, directed him to fold it.

On one of these occasions the voter passed into the front room without having folded the paper, and the policeman heard the presiding officer in the front room desire the voter to fold it; but the mark was not seen by the policeman or any one outside the front room; whether or not it was seen by any person inside, did not appear.

In the early part of the day, in one of the back rooms, the table was so placed that the voter might possibly, by pre-arrangement with a person outside on the landing, or from carelessness, stand in such a position while marking his paper as to permit such person to see the mark; but, having twice carefully inspected the locality, I think such an occurrence extremely improbable, and I am, on the evidence, of opinion that it did not occur.

On one occasion the voter, having marked his paper in the back room, left it there on the table, and was proceeding down stairs, when the policeman asked him what he had done with his paper, and the voter replied that he had left it inside in the back room, apparently under the impression that such was the proper mode of voting.

Neither the high sheriff, the sub-sheriff, the resident magistrate in charge, nor any of the policemen, took declarations of secrecy; but there was no reason whatever to believe that this circumstance led to any infringement of the secrecy of the ballot.

The resident magistrate on one occasion went into one of the polling stations (the court-house) in order to see the arrangements, not being aware that there was at the time an illiterate voter in the act of voting there.

The resident magistrate was accompanied by the high sheriff, and the sub-sheriff was also there, and all three overheard the illiterate voter recording his vote for Dr. O'Leary.

The policeman on duty in the lower part of the court-house,

although a considerable distance from the presiding officer, overheard three illiterate voters, who spoke very loud, naming the candidates for whom they voted; two voted for O'Leary, and one for Whitworth.

This last-mentioned matter is not stated or complained of in the petition to which I refer. It appeared to me that the election was conducted in accordance with the principles laid down in the body of the Ballot Act, 1872, unless the matters hereinbefore stated, or some or one of them, be infringements, or an infringement, departures, or a departure, from these principles; and it appeared to me that so far as the matters hereinbefore stated, or any of them, are or is a non-compliance with the rules contained in the first schedule of the said Act, such non-compliance did not affect the result of the election.

I request the opinion of the court whether under these circumstances the election should be declared invalid.

The special case was argued before the Court of Common Pleas,* but, as the court was equally divided in opinion, no decision was pronounced, and the case was sent back to Mr. Justice Barry, endorsed as follows:—"The special case reserved by Mr. Justice Barry stating certain questions of law for the opinion and determination of the court in this election petition matter having come on for argument to-day, on hearing counsel . . . for the Petitioner . . . and Respondent, the court being equally divided in opinion, pronounce no decision."

Mr. Justice BARRY, in his final judgment, declared the Respondent duly elected.

After recapitulating the facts as set out in the special case he said as follows:—

"Such being the result of the evidence, Mr. Fitzgibbon, for the Petitioners, contended, in his reply, that the election was void on two grounds: (1) That the adoption of a second room for the purpose of marking the ballot-papers was in itself a violation of the rules of the Ballot Act, which, he contended,

Point of law submitted to Court but not decided.

* The judgment of the Court was delivered on June 5, 1874, but no report of the case has as yet appeared in the Irish Law Reports.

required all the operations of voting to take place in the one apartment; and (2) That the facilities afforded to the elector while passing from one room to the other to show his ballot-paper was a fatal departure from the principles of the Act. These points I submitted for the determination of the Court of Common Pleas, because I thought that a question of such importance on the principle and working of this new Act of Parliament ought to be decided by the highest court in the country. The result, we all know now, has been that the court was equally divided. But now remains the question, What is to be the result of this state of things? Taking the endorsement on the case which was made by order of the Court in connection with the language of at least one of the judges of the Court of Common Pleas, it seems to be taken for granted by that Court that the result of their division in opinion is to discharge them from the duty of determining the question submitted to them, and that the case reverts to me for my independent decision, as if it had never been submitted to that Court. One thing is certainly clear, that I am not in the position of a fifth judge of that Court, whose opinion would constitute him a judicial majority. But is it clear that the Court of Common Pleas was not bound to determine the case one way or another, and furnish me with that determination? Does the case revert to me for my independent decision? If it does, the result is certainly curious and unparalleled. A Supreme Court is provided for the "determination" of legal questions which may be deemed by the single judge at the trial too doubtful and important for his single decision. A question is reserved by a judge for the "determination" of this Supreme Court, and the result is that this supreme tribunal informs the judge who has invoked their judgment that the case is so doubtful and perplexing that they are divided in opinion, and can arrive at no conclusion, and that he must therefore decide the matter for himself as best he can. A more singular transmutation of judicial positions can scarcely be imagined. But is the Legislature really responsible for such an anomaly? By sect. 11 of the Parliamentary Elections Act, 1868, the judge, at the conclusion of the trial, is to certify to the House of Commons his determination; but under sect. 12 he has power, if he pleases, to 'postpone the

granting of the said certificate,' and to reserve a question of law for the Court. Now it is to be observed that this section does not, in terms at least, give the judge a power to adjourn *the trial*, in order to take the opinion of the Court upon some incidental question, and having obtained that opinion, then to resume the inquiry. His power, as expressed in terms, is to postpone that which takes place after the trial is concluded, namely, the granting of the certificate. And it thus may be well argued that the only reservation contemplated by the statute, is the reservation for the '*determination*' by the Court of some question upon the determination of which the nature and effect of the judge's certificate to the Speaker must absolutely and conclusively depend. And if this be so, and if the equal division of the Court is to be regarded as no 'determination' at all, and if the difficulty be not solved as in cases of demurrer by the withdrawal of the junior judge, then the granting of the certificate being postponed until the 'determination' of the question by the Court of Common Pleas, which is never to happen, it may be contended that the ludicrous result would ensue, that the whole proceedings are indefinitely suspended, and the decision of the case postponed *sine die*. The possibility of such a contention could be avoided, and full effect given to the statute, either by the withdrawal of one judge, or by holding the effect of an equal division of the judges to be the same as the effect of a similar division, in other cases where the action of an inferior tribunal is submitted to the review of an appellate or correctional tribunal consisting of an even number of judges; which effect is that the act of the inferior tribunal is deemed to stand affirmed. For example: during the last term, a case came before the Court of Queen's Bench where, under a very useful but obscurely worded statute, one of the divisional magistrates made a conviction, but reserved, by way of case stated, the question of the legality of that conviction for the Court. The judges were equally divided, and the conviction stood affirmed. So, in a recent case, in one of the other courts, a question arising on a civil bill appeal was reserved (by way of case stated under the statute) by the appeal judge for the opinion of the Court. The judges were equally divided, and the decision of the recorder, or chairman, stood affirmed. And if, under the 11th section of this Parlia-

mentary Elections Act, the parties themselves were, under the direction of the Court, to state a special case, if the Court were equally divided, I apprehend the result would be either that the election would be declared valid, or a determination would be arrived at by the withdrawal of a judge. It is difficult to see any valid reason in substance why the same result ought not to follow, or the same course to be adopted in the present case. The fact that the question was reserved by the judge at the trial, is really only a distinction without a difference, or if it makes any difference it affords an additional reason why the Court of Common Pleas should, in some way or other, determine the question; so that the anomaly of one judge sitting to criticise and review the conclusions of the four judges to whom he appealed for guidance would be avoided.

"However, I do not mean to give any opinion on this subject, or to decide this case upon such considerations. I shall assume that the judges of the Court of Common Pleas have actually in point of law, and in point of fact, failed to do that which the statute contemplated, and as it would seem, required that they should do, namely, to 'determine' the question, 'was this a valid election?' I shall assume that the opinions of the judges are to be regarded as merely abstract opinions devoid of any adjudicative efficacy, and that the question to be decided, as it is said, 'reverts' to me. It seems to me that my course is clear and simple. The election, as I have said, was pure and free. I am bound upon the evidence to assume, and I do assume, that the election of the sitting member was the result of the choice of the electors honestly and fairly exercised, and in effect, with all the secrecy of the ballot; for in no one instance was a ballot-paper shown to or seen by an unauthorised person. In anything that has occurred, the sitting member, his agents, and his friends are wholly free from blame. He and they had no control whatever over the arrangements made by the sheriff. There was evidence in the case that his conducting agent disapproved of them. And the question for me is, am I, under these circumstances, to unseat this member, and declare this election void, for the mere act of the returning officer; an act for which the member, and his friends, and the electors are irresponsible; an act which was the result of a mere

error of judgment on the part of the returning officer; an act by which the result of the election was in no degree affected; an act, no doubt alleged to be illegal, but of which the illegality is so doubtful, that the judicial mind of the Court of Common Pleas, constituted as that Court is of men of conspicuous ability and experience, has, after full argument and consideration, failed to ascertain its existence.

"In a case in England,* where it was sought to avoid an election, on the ground of irregularity or illegality in the taking of the poll at one of the booths, that able and experienced judge, Baron Martin, in giving judgment, said: 'I adhere to what Mr. Justice Willes said at Lichfield, that a judge, to upset an election, ought to be satisfied beyond all doubt that the election was void, and that the return of a member is a serious matter, and not to be lightly set aside.' The question raised in that case may not be precisely of the same character as the question raised here, but the rule laid down by that eminent judge seems to me to be consonant with justice and with common sense, and to be one of general application. Applying, then, that rule so laid down by Mr. Baron Martin, I decline to say that I am satisfied that this election is void, which election two judges of the Court of Common Pleas have, after argument in the full Court, declared to be valid. I therefore decide and determine that the sitting member, Dr. O'Leary, was duly elected for the borough of Drogheda, and I shall so certify to the Speaker."

Costs.

As to costs he said:—"I think it is a good general rule that the party who is successful should be indemnified as to costs by his unsuccessful adversary, or, in a case like this, by the person whose act has rendered necessary the litigation, and, in that view, I should have had to consider whether I should visit the costs of the petition on the returning officer or on the Petitioner, or on both. However, having regard to the novelty of the question here raised, to the fact that the returning officer acted bonâ fide, and especially to the precedent furnished to me by the Court of Common Pleas in the Athlone case,† I shall not adopt that course. In that case the petition was rendered necessary by a decision of

* Warrington, vol. i. 44.

† Ante, p. 190.

the sheriff respecting some ballot-papers, which decision was overruled by the Court; but the Court having regard, as I understand, to the bona fides of the sheriff, and to the fact that the unsuccessful candidate was seeking to maintain the ruling in his favour of the Court below, resolved that all parties should bear their own costs. It seems to me that, having regard to the division of opinion in the Court of Common Pleas, this case is one *à fortiori* for the adoption of a similar rule, and, therefore, I declare that the parties shall abide their own costs."

CASE XXXIV.

COUNTY OF RENFREW.

BEFORE LORD ORMIDALE, APRIL 6, 1874.

Petitioners: Charles Edward Irvin and James Macgregor.

Respondent: Colonel Mure.

Counsel for Petitioners: The Solicitor-General; Mr. Macdonald.

Agent: Mr. John Walker.

Counsel for Respondent: The Dean of Faculty; Mr. Balfour.

Agents: Messrs. Morton, Neilson, and Smart; Mr. James Macdonald.

Counsel for Returning Officer: Mr. Burnet.

Agent: Mr. John Galletly.

THE petition craved the Court to order the ballot-papers to be recounted, so that the correct numbers voting for each candidate may be ascertained, and that it may be determined that the Respondent was not duly elected or returned, and that Colonel Campbell was duly elected, and ought to have been returned.*

As soon as the Court was opened,

Mr. William Hector, the sheriff-clerk, was sworn, and produced the counted ballot-papers.

* A note was presented by the Respondent against this petition to the Court of Session, craving the Court to dismiss it as irrelevant, and as containing a prayer not warranted either by the Parl. El. Act, 1868, the Ballot Act, 1872, or any other statute, law, or practice. The judges, however, were unanimously of opinion that the note of objections should be refused, and that the petition should be allowed to proceed, the expenses of the application to be borne by the Petitioners.—*Times* newspaper, Mar. 13, 1874.

Eight enumerators were then sworn, and proceeded to separate and count the ballot-papers.

After the counting was concluded,

Lord ORMIDALE said, "The enumerators have handed to me twenty-two ballot-papers which are not marked in strict conformity with the form which is given in the statute; eight of these are for the Respondent, and fourteen for Colonel Campbell, the unsuccessful candidate. The admission or rejection of these, however, does not affect the result. Throwing them aside there is a majority of ninety-seven for the Respondent. If, on the other hand, they are counted there is still a majority of ninety-one. In that state of matters I presume that no question will be raised as to these papers.

The Solicitor-General.—No, my Lord; I raise no question.

Lord ORMIDALE.—Then counting them all, there are 1,990 for Colonel Mure, and 1,899 for Colonel Campbell, making a majority of ninety-one for Colonel Mure. I have, therefore, to declare that Colonel Mure has been duly elected and returned, and I shall certify that to the Speaker.

Costs. Costs followed the event.

CASE XXXV.

DISTRICT BURGH OF WIGTOWN.

BEFORE LORD ORMIDALE, APRIL 6, 1874.

Petitioners: Andrew Haswell and Robert Jamieson.

Respondent: Mr. Mark John Stewart.

Counsel for Petitioners: The Dean of Faculty; Mr. Balfour.

Agents: Messrs. Gibson-Craig, Dalziel, and Brodies.

Counsel for Respondent: The Solicitor-General; Mr. Macdonald.

Agents: Messrs. Tody, Murray, and Jamieson.

THE petition, after stating that the returning officer had returned the Respondent as being duly elected by a majority of two votes, the numbers reported by the returning officer being 522 for the Respondent and 520 for the unsuccessful candidate, the Right Hon. George Young, alleged that the return of the Respondent was undue and erroneous and that "the said number of 522 votes reported by the returning officer as given for the Respondent was arrived at by counting as good votes a large number of votes which ought not to have been counted, but ought to have been rejected as not being in terms of the Ballot Act, 1872, by reason

(1). Of the ballot-papers so counted not being marked in accordance with the provisions of the Ballot Act, 1872.

(2). Of their containing writings or marks by which the votes could be identified.

(3). Of their being unmarked or void from uncertainty."

And the petition further alleged that the said Right Hon. George Young had since the date of the said election been appointed and had taken his seat as one of the Lords of the Session.

And the petition prayed that it might be determined "that the Respondent was not duly elected on return, and that his election and return were and are wholly null and void, but that the said Right Hon. George Young was duly elected, and ought to have been returned as member of Parliament for the said Wigtown district of burghs, and that the place of member of Parliament for the said Wigtown district of burghs is now vacant; or to do otherwise in the premises as to your lordships shall seem proper."

As to this petition the Respondent sent to the Lord President of the second division of the Court of Session a "note," denying the allegations in the petition.

After the proceedings had been opened

The Dean of Faculty for the Petitioner objected to the ballot papers numbered 701, 1,307, on the ground that they did not bear the official mark as required by the Ballot Act, s. 2.

Rejection of ballot papers from want of official mark.*

Lord ORMIDALE:—It has not been said by the Solicitor-General on behalf of the Respondent that papers 701 and 1,307 bear any indication by mark or otherwise of a stamp having touched them, and upon examining them I cannot find that there is any mark upon them. I therefore have no alternative but to hold that they ought not to have been counted, and that they must now be rejected. I apprehend that there must have been an omission in the hurry of the proceedings to apply the official mark. No doubt this is a hardship upon the voter in one sense, but in the "directions as to voting" which was put up in conspicuous places at the polling booths reference is made to the official mark, and the voter has a particular duty to perform in reference to it, that is to say, he must fold up the ballot-paper so as to show the official mark on the back. Therefore his attention is directed to that matter, and it is his own fault if he does not see that the mark is upon his voting paper.

Rejection of ballot-paper which has any.

Mr. *Macdonald*, for the Respondent, objected to ballot-paper 911 on the ground that it bore the name A. C. Allan, clothier,

* As to this, see Pickering *v.* James, L. R. 8 C. P. 489.

and thus afforded means of identification. It appeared that the voter numbered 911 on the register was not named A. C. Allan. thing written on it.

Lord ORMIDALE said as to this: "The construction which I am disposed to put on the statute * is that this name which has been written on the ballot-paper might lead to the identification of the voter. It is quite clear that the statute does not contemplate that there should be an investigation at the time, or that the presiding officer was bound to inquire or to know anything about the name. It should have been enough for him that there was a name put on the voting paper which might lead to the identification of the voter afterwards. Therefore I must sustain this objection.

The *Dean of Faculty* objected to ballot-paper 596, on the ground that it had a mark at the side of the cross, and 172 on the ground that the cross was made in a peculiar manner: he submitted that in both these cases the voters might be identified. Objection to ballot-papers on the ground of capability of identification.

Lord ORMIDALE:—I think it would be too critical to hold that what is objected to in these cases was a concerted or a designed proceeding for the purpose of identification afterwards. I therefore hold that these two papers are good voting papers for the Respondent.

Objections were also taken both on the part of the Petitioner and the Respondent to a number of other votes, and with regard to eleven of the ballot-papers objected to by the Petitioner and eight objected to by the Respondent a special case was drawn up and submitted to the second division of the Court of Session.

This special case, after stating the grounds of the petition and the result of the trial, went on as follows:—

VIII. The following are shortly the grounds upon which the said eleven objections for the Petitioners are rested:—

(1)†. The ballot-papers Nos. 64 and 1,146 are objected to as not marked with a cross in terms of the Ballot Act,

* Ballot Act, 1872, Sch. 2. *Form of directions for guidance of voters* enacts that, "if the voter places any mark upon the paper by which he may be afterwards identified his ballot-paper will be void, and will not be counted."

† This objection was not sustained.

1872, and relative schedules, and as containing marks whereby the voters could be identified.

(2).* No. 57 is objected to, because, instead of being marked with a single cross to the right of the candidate's name, it is marked with two crosses, neither being in the proper place, but one diagonally before the name to the right and the other diagonally below the name to the left, and is so marked that the voter could be identified.

(3).* No. 634 is objected to, as not being marked with a cross at all, but with a single stroke, whereby the voter could be identified.

(4).† No. 143 is objected to because not marked with a cross at the right hand of the candidate's name and outwith the space for the candidate's name, and void from uncertainty, but with a cross above the name, and as being so marked that the voter could be identified.

(5).‡ No. 61 is objected to because not marked with a cross on the right of the candidate's name, and because the only mark on the paper is a mark, not a cross, to the left of and outwith the space for the candidate's name, whereby the voter could be identified.

(6).† No. 402 is objected to because not marked with a cross on the right of the candidate's name, but with a cross below the name whereby the voter could be identified.

(7).* Nos. 1,039 and 277 are objected to because not marked with a cross on the right of the candidate's name, but only with crosses or marks on the left of the name, whereby the voter could be identified. And,

(8).† Nos. 840 and 922 are objected to because not marked with the materials provided by the returning officer, viz., black lead pencils, but with ink, whereby the votes could be identified.

IX. The following are shortly the grounds upon which the eight objections stated for the Respondent are maintained :—

* This objection was sustained by the majority of the Court.

† This objection was not sustained.

‡ This objection was unanimously sustained.

(1).* The ballot-papers Nos. 35, 37, and 1,160 are objected to as not marked with a cross in terms of the Ballot Act, 1872, and relative schedules, and as containing marks whereby the voters could be identified.

(2).† No. 468 is objected to, because, instead of being marked with a cross to the right of the candidate's name, it is marked (1) with a cross containing marks whereby the voter could be identified; (2) the cross is not placed in the proper place, but above and over the candidate's name; (3) there are two parallel strokes drawn on the back of the voting paper in the corresponding place to the left of and over the candidate's name, as the cross to the right, whereby the voter could be identified.

(3).‡ No. 643 is objected to as being marked with an angular stroke opposite the cross to the right of the candidate's name, whereby the voter could be identified.

(4).‡ No. 460 is objected to because not marked with a cross to the right of the candidate's name, and because there is a cross to the left of and under the candidate's name, whereby the voter could be identified.

(5).* No. 556 is objected to because it is not a ballot-paper as issued by the presiding officers, and even if it is a ballot-paper, it is mutilated so that the voter could be identified.

(6).* No. 814 is objected to because not marked with the materials provided by the returning officer, viz. black-lead pencils, but with ink, whereby the voter could be identified.

The question of law for the determination of the Court was,

Whether the above-mentioned ballot-papers to which objections have been stated, or any, and if any, which of them, are, in respect of said objections, invalid, and ought not to have been counted.

* This objection was not sustained.

† This objection was unanimously sustained.

‡ This objection was sustained by the majority of the Court.

In reply to these questions the following judgments were delivered:—

Lord NEAVES.] The questions here raised are important and delicate on this account in particular, namely, that while a certain form of exercising the franchise is pointed out in the statute on the subject, some deviations from the strict letter of the directions therein contained may be so trifling as to be immaterial, while others may be more serious, and thus may be fatal. The merits of each vote, therefore, may turn on questions of degree, which it is always difficult to distinguish, as the one class may run almost imperceptibly into the other. This is the old puzzle as to how many grains of corn make a heap, or at what stage a little thing grows into a big one.

In this state of matters the important point is to look to the great objects and principles of the statute, and to take care that we do everything necessary to follow these out, and nothing that can defeat or endanger them.

The great object in view, I take it, in the Ballot Act is the double result of facility in the exercise of the franchise and perfect secrecy as to the vote of individual voters. This double purpose is by the Act sought to be accomplished by not allowing a vote to be given *vivâ voce*, as it used to be, nor in writing (properly speaking), in either of which cases secrecy would be impossible, or would be imperilled, for by writing, though not setting forth the writer's name, yet through the *comparatio literarum* the writer might be discovered. Nor would it have done, perhaps, to leave the voter to put any mark he pleased to show the candidate for whom he voted. A mark has been pointed out and represented in the statutory directions, that of a cross, thus ×. It is, I think, a mark well devised for the purpose, easy of execution by men of the most moderate intelligence, and at the same time perfectly neutral in its character, so as to be practically incapable of betraying its authorship by its appearance. I think it is scarcely possible that a ballot-paper strictly in terms of the statute should lead to the voter's identification, one man's cross being in general undistinguishable from another man's.

In these circumstances, I think it essential to a good vote that the voter should make the cross thus pointed out, and that any

mark materially different would be a deviation from what is prescribed, and a failure to fulfil the requirements of the statute. For anyone to put, instead of a cross, a circle or an oval, or any other geometrical or anomalous figure, would not be a compliance with the law, independently of the consideration that such a plain and wilful departure from what was intended would suggest strongly the suspicion that some sinister purpose was intended.

In one of the votes before us, being, I think, No. 634, there is no cross, or attempt at a cross, but merely an oblique straight line. I think that the voter who made this mark has not exercised his franchise under the Ballot Act, and that his ballot paper ought not to have been counted.

On the other hand, there are ballot-papers in which a cross is made, or attempted to be made, but is not very well made; whether from unsteadiness of hand, or accidental disturbance, the cross lines are not clear or steady, but somewhat shaky and irregular. I am of opinion that such imperfections and defects are not fatal, and that it would be harsh and unjust to disfranchise a voter for such appearances. Neither am I inclined to punish with disfranchisement one voter here who has made a very respectable cross, but who has thought that it might not be the worse for small feet or claws to support it, and make it like a printed capital X. That seems to me an innocent idea, and at any rate not a sufficiently serious or suspicious addition to make his vote bad. I don't know whether this voter may not have been reading Johnson's Dictionary, and referring to a word which he is very fond of using, the word "decussate," which he explains as meaning "to intersect at an acute angle," and he quotes some passages which show that decussating is used by lines having the form of the letter X decussating one another longways. Now this voter has decussated these lines, and in doing so has made very small feet or resting places for them. I would not advise that system to be carried too far; but where it is done as appears here, I would not hold that it operates a disfranchisement of the voter.

On the other hand, where there has been put on the ballot-paper a substantial and separate addition to the voter's mark,

this seems to me to be a good objection, and to be struck at expressly or virtually by one of the clauses of the 2nd section of the Ballot Act, Part I., by which any ballot-paper is declared void on which anything but the number on the back is written or marked by which the voter can be identified. This clause is one which is not perhaps expressed with the precision that would have been desirable, for it is not exactly clear upon the face of it what is meant by the nullity or vice here indicated. But I think that under this enactment any plain and palpable addition on the ballot-paper unconnected with the actual mark of the vote is a fatal objection. We have among these ballot-papers one which has a black line drawn on the back, and others on which there is a plurality of crosses on the front, and it is undoubtedly a nice and important question whether these unnecessary things are merely superfluous and innocent, or whether they fall under the category of being marks by which the voter can be identified.

I think that this declaration of nullity does not require that there should be absolute proof of a design or intention on the part of the voter to be identified. That is not said, and is not to be expected; and considering the secrecy of the proceedings, it cannot be supposed that either the returning officer or the election judge should be able to say what was the intention of the party in thus adding to the statutory expression of his vote. But it is plain that such additional marks may be used as a means of communicating information such as might lead to identification, and where they are plainly done, not by mere carelessness or want of skill, we are naturally led to ask, why are they there at all, except for some sinister purpose? If we allow any superfluous additions of this kind, we may be obliged to pass them over, however numerous they may be, and thus a door would be open to evasion of the essentials of the Act. If a voter puts the cross strictly in terms of the statute, there is scarcely a possibility of identification from the ballot-papers; but if a voter, besides his proper cross, puts one or more additional crosses, or puts circles or ovals *ad libitum*, he raises a strong suspicion against himself, and has himself to blame if his ballot-paper is rejected.

All such superfluities are the less excusable as the Act pro-

vides for having a new ballot-paper if one has been spoiled or rendered unfit or unsuitable for the purpose in the course of voting.

With regard to the position of the cross, it is directed to be put on the right-hand side, opposite the name of the candidate. I think some latitude must be allowed on this subject, and that if the mark is opposite the candidate's name, and towards the right-hand side, the paper should be sustained, but not if it is decidedly at the left-hand side, which seems a gross as well as a suspicious deviation from the statute.

I think that it is not essential that the cross should be made with pencil. The directions, indeed, contain this paragraph, p. 120 of the book we have in our hands, that the voter will take the pencil in the compartment and mark his vote; but this is not a substantive enactment, and is not expressed in imperative words. The 25th section in the body of the Act, Part I., says merely that he shall put his mark, and the 20th section speaks of materials to be provided. The use of the "pencil" provided in the directions cannot be enforced. It would be impossible to inquire whether a pencil mark was made by the pencil of the presiding officer or by the pencil of the voter, and therefore it seems impossible to object to that. A good cross with any pencil, or with any ink not peculiar, seems unobjectionable, and not contrary to any purpose contemplated by the Act.

Besides, it is impossible to say whether the ink used here may not have been used by the presiding officer under some of the clauses of the statute which permit his interference.

Upon these principles, I have formed my opinion that certain of the votes here objected to should be sustained, and that to others the objections should be sustained, and the votes disallowed. It will be the duty of the election judge to follow out the findings which we may pronounce, and to apply them to the numerical question on which the result of the election depends.

Lord ORMIDALE.] I think it right to explain that while I disposed of various points relating to the validity of ballot-papers, which were discussed before me as election judge in this petition, I considered it desirable to reserve for the determination of the

Court the objections referred to in the Special Case now before us. I was induced to do so as well by the difficult and perplexing nature, in some respects, of these objections as by the obvious desirability of having, as far as practicable, some rules or principles established by the more authoritative judgment of the Court than that of a single judge, for the guidance of parties who may be concerned in future elections. This appeared to me to be all the more desirable as there is reason to believe that the opinions entertained and given effect to by the presiding and returning officers in the recent elections throughout the country were far from uniform.

The particular sections of the Ballot Act, upon the true construction of which the questions now to be determined chiefly depend, are referred to in the Special Case.

The great object of the Act appears to be to prescribe such a mode of procedure as, while it would enable the electors to give their votes in a ready and simple form, will at the same time ensure that this is done with as much secrecy as is attainable in such a matter. Accordingly, in the second schedule to the Act, there is what is called "Form of Directions for the guidance of the voter in voting," and among other things it is there prescribed that "the voter will go into one of the compartments" (at the polling place) "and with the pencil provided in the compartment place a cross on the right-hand side opposite the name of the candidate for whom he votes, thus ×." And in the same schedule it is declared that, if the voter places any mark on the paper by which "he may be afterwards identified, his ballot-paper will be void, and will not be counted." Although these statutory provisions are in one of the schedules to the Act, and not in the body of the Act itself, and are under the title, "Form of Directions for the guidance of the voter in voting," it must be kept in view that by section 28 it is enacted that the schedules and directions therein "shall be construed and have effect as part of this Act." Not only so, but to denote the imperative nature of the prohibition against the placing by a voter on a ballot-paper anything by which he may be identified, it is by the 2nd section of the Act itself expressly enacted that any ballot-paper "on which anything except the said number on its back"

(the number previously mentioned in the same section) "is written or marked by which the voter can be identified shall be void, and not counted."

What, then, are the objections to ballot-papers now to be determined by the Court, and are they, or any of them, of a nature which must be held to be fatal to the votes? They are generally to the effect that the ballot-papers contain marks or writings which are not only prohibited by the Act, but are of such a description that the voter may or can be thereby identified.

Now, while it would be desirable that some precise and well-defined rules were established for the determination of all such questions, in their various specialities and modifications, I do not see how this can be adequately done by the Court. I do not, for myself, see that I can do more in this direction than to state that, while on the one hand there must be a reasonable and substantial compliance with the provisions of the Act, on the other hand trivial or unimportant deviations, such as might not unfairly be held to be incidental to the performance of the piece of work in question by different individuals of different ages, habits, and conditions, ought to be disregarded, provided that the true object and intention of the voter is free from serious doubt, and that there is not sufficient ground for holding in a fair and reasonable sense that there is any mark or writing on the ballot-paper whereby the voter can be identified. There is one thing, however, as to which I am clear, viz. that in order to show that any writing or mark on a ballot-paper, unauthorised by the statute, is of a description whereby the voter can be identified, it is not necessary that an inquiry should first be gone into for establishing the identification, or for the purpose of showing that the voter had by previous concert with others intended to make it known for whom he voted. Not only does the statute not provide for or make any allusion to such an inquiry, but it is plain, I think, from the only interpretation that can be given to its provisions, that it is enough that the mark, if any, other than the authorised one appearing on a ballot-paper is of a description whereby the voter might be identified.

Having regard, then, to these general considerations, it

appears to me, after giving all due effect to the argument which was addressed to the Court, and after a personal examination of the ballot-papers in dispute, that two crosses, neither of them being in the proper place, or a cross or crosses, or other mark or marks on the ballot-paper to the left of the candidate's name, or, in addition to a cross, a separate distinct stroke on the ballot-paper to the right of the candidate's name, or, instead of any cross at all, a mere stroke on the ballot-paper, or two parallel strokes on the back of the ballot-paper, besides a cross in the front, cannot, in any reasonable sense, be held to be trivial or unimportant deviations from the statutory directions, but, on the contrary, must be held, not only to amount to a substantial failure to comply with the statutory directions, but also to be marks or writings of a description whereby the voter may or can be identified. And if so, it follows that the 13th section, or what may be called the saving clause of the Act, is inapplicable; and, indeed, I did not understand that that clause was contended to be, in the circumstances of the present case, of any material importance.

In the views which have now been stated by me, and which I believe are in unison with those which have been expressed by Lord Neaves, the ballot-papers Nos. 57, 634, 61, 1,039, and 277, objected to by the Petitioners, Messrs. Haswell and Jamieson, and the voting papers Nos. 468, 643, and 460, objected to on the part of the Respondent, Mr. Stewart, are invalid.

On the other hand, I am of opinion, although not without difficulty as regards some of them, that the objections taken to all the other ballot-papers on either side cannot be held to amount to such a departure from the requirements of the statute as to invalidate the votes. And in reference to the ballot-papers Nos. 840 and 922, objected to by the Petitioners on the ground that ink and not a pencil was used by the voter, and the voting-paper No. 814, objected to by the Respondent, on the same ground, I may explain that I do not see how these objections can be sustained, because the use of a pencil is not positively and directly enjoined by the statute, although some reason for holding it to be implied is afforded by the phraseology used in part of the first schedule to the Act, and also because the only positive and

direct enactment on the subject is that in section 20, to the effect merely that "the returning officer shall provide each polling station with materials for the voters to mark the voting papers;" but what materials, whether pencils or pens and ink, are not specified. Besides, even if it were to be held that, having regard to what is said in the directions in the second schedule to the Act as to a pencil, the using of ink is not allowable, and might afford means for identification, it would be necessary, I think, for a party taking such an objection to support it by proof to the effect that the ballot-papers referred to were not marked by the presiding officer for voters who were unable to do so for themselves, in terms of the 25th section of the Act, which neither expressly nor by implication makes it requisite that in such cases a pencil and not ink must be used by the presiding officer.

The result is that, for the reasons I have now stated, the questions submitted for the determination of the Court in the Special Case ought to be answered as follows:—

I. That of the eleven ballot-papers referred to in the first question to which objections have been stated for the Petitioners, Nos. 57, 684, 61, 1,039, and 277, are, in respect of said objections, invalid, and ought not to have been counted; and

II. That of the eight ballot-papers referred to in the second question, to which objections have been stated for Mr. Stewart, Nos. 468, 643, and 460, are, in respect of said objections, invalid, and ought not to have been counted.

Lord BENHOLME.] As my two brethren are agreed in regard to the disposal of the objections to the votes now before us, my opinion becomes of little consequence; but I confess I think they have gone too far in sustaining the objections. It appears to me that two of the votes are clearly objectionable. One of these falls under that part of the Act which enacts that any ballot-paper "on which anything except the said number on the back is written or marked, by which the voter can be identified, shall be void and not counted." Now, any mark on the back of a voting paper (by which it is patent to all and sundry) seems to me to be marked out as censurable, and as fatal to a very different extent from marks within the voting paper (and consequently concealed),

that may be extraneous to the proper function of the voter. It is declared that any mark upon the back is to be fatal. Thus, therefore, I think we all agree that No. 468, which has two parallel strokes drawn on the back of the paper, cannot be sustained under the express words of the statute. That is a mark obvious to everybody, because the outside of the ballot-paper is not concealed at all. That, I understand, is the only voting paper bearing any mark on the outside, except one with which we have nothing to do, but which the judge disallowed at the trial, there being a name written upon it.

With regard, however, to superfluous marks made on the inside in adhibiting the cross to the name of the candidate for whom the elector gives his vote, I think these stand in a different category. I quite agree with my brethren that in one case, where there is no cross at all, but merely a line, the voter has completely failed to declare his choice. But on the other hand, where a cross has been made, and where that cross is so placed as to leave no doubt for which candidate the voter intended to vote, I am not able to agree with the principles upon which my brethren have determined to reject several such voting papers. In the first place, I think it is not fatal that the cross is put on the left hand, or above, or immediately below, provided it is so placed as to leave no doubt as to the candidate for whom the vote was intended. Further, where a proper cross has been made, designating the intention of the voter to vote for a particular candidate, and leaving no doubt as to what candidate he intended to vote for, I am not prepared to say that the addition of a score or a double leg to the cross, which may have been the result of awkwardness or accident, or of not exactly seeing how he was to commence the cross, ought to be visited upon the voter by nullifying his vote.

I think it is very difficult to draw a line (on the principles adopted by my brethren) between such additions to the cross as shall be fatal and such additions as shall not be fatal. It appears to me that what we ought to look to is this, whether the deviations from or additions to what the statute requires can be held to accomplish the desire of the voter to let his choice be ascertained, independently of a previous concert of a censurable

kind with the candidate. I consider that the smallest tick, such as might escape the eye of even a vigilant officer, might be and most likely would be agreed upon between the candidate and the supposed corrupt voter, in order to satisfy the former that the latter had performed his promise to vote for him. A prominent, a decided mark would be avoided. But whether it is a score, or whether it is a kind of double leg to the cross, or two crosses instead of one, it does not appear to me that one can lay down any distinct rule except this, that it must be something that indicates, in its own nature, an improper agreement with the candidate. As an illustration of what I think the danger of ruling that any additional score, or cross, or double line shall be held to be fatal to the vote, I may refor to the fact that precisely the same additions have been made by voters on both sides; and certainly I think it is beyond all ordinary chance that the two candidates should have accidentally agreed upon the same marks to indicate the votes given for them by electors.

As to the place of the mark, I think the important matter in reference to the validity of the paper is that the cross shall be so placed as to ascertain the candidate for whom the voter intends to give his vote; that it shall be so near the name of that candidate as to show the intention of the voter; whether it is on the left hand or the right hand, or a little above, or a little below, I don't think that such circumstances are of any importance. Further, I don't think that a distinct score, which may have been merely the commencement of making a cross, is more suspicious than a small mark not assuming the proportions of a line, but something that by reason of previous concert will equally serve the corrupt purpose of the voter. While, therefore, I have no hesitation in rejecting the two papers, on one of which there is a mark on the outside, and on the other of which there is in the inside no cross at all, I am not prepared to reject any of the others.

The judgment of the Court was then read as follows :—

Edinburgh, 23rd May, 1874.

THE Lords of the Second Division (Lord Moncrieff absent), having considered the Special Case, and heard Counsel for the

parties, are of opinion, and find in answer to the first question, that of the 11 ballot-papers therein mentioned to which objections have been stated for the Petitioners, Nos. 57, 634, 61, 1,039, and 277, but not any of the others, are in respect of said objections invalid, and ought not to have been counted; and find, in answer to the second question, that of the eight ballot-papers therein mentioned to which objections have been stated for Mr. Stewart, Nos. 468, 643, and 460, but not any of the others, are in respect of said objections invalid, and ought not to have been counted.

(Signed) *H. J. Robertson*, J. P. D.

On a subsequent day,

Lord ORMIDALE delivered judgment, and, after stating that the state of the votes at the time the Special Case was ordered left a majority of one in favour of the Respondent, and that five objections, on the part of the Petitioner, as against three on the part of the Respondent, had been sustained by the Court, declared that the Respondent was not duly elected; adding a special report, stating that Mr. Young, being now one of the judges of the Court of Session, the seat was not now claimed for him.

Costs.

The DEAN of FACULTY, for the Petitioner, then moved for the costs of the Petition, including the costs of the Special Case.

The SOLICITOR-GENERAL opposed the motion, and cited the Athlone case.*

Lord ORMIDALE.—The general rule undoubtedly is that the successful party gets his expenses, but there is as little doubt that in many cases the Court does not give costs to the successful party, even although it cannot be said against him that he has been guilty of misconduct in carrying on the litigation. In reality the question of costs is held to be in the discretion of the Court. Here it is not suggested that there was any misconduct on either side, either at the election or in the litigation under the present petition. It must be assumed that the returning officer, in dealing with the voting papers, acted *proprio motu*, without any suggestion on the part of the Respondent, and if so, the principle

* Ante, p. 190.

on which the Court proceeded in the Athlone case,* to which I have been referred, comes to be of importance. The principle there acted upon was that, as there was no misconduct by either party, each party should bear their own costs. Now that principle arises here exactly, and is equally applicable. It does not appear that the errors in the ballot-papers were caused or suggested by the Respondent. It is, no doubt, a misfortune that these errors should have arisen, and that in consequence the parties should have been subjected to, it may be, a good deal of expense, but, having regard to the principle which I think must recommend itself to any Court exercising its discretion in the matter of costs, I do not think I can do otherwise than follow the Athlone case as an example, though not a binding rule. I therefore hold that in this case each party must bear his own costs.

* Ante, p. 190.

CASE XXXVI.

DISTRICT BURGH OF WIGTOWN.

BEFORE LORD NEAVES, AUG. 6, 1874.

Petitioner: Mr. Augustus Smith.

Respondent: Mr. Mark John Stewart.

Counsel for Petitioner: Mr. Balfour.

Agents: Messrs. Gibson-Craig, Dalziel, and Brodies.

Counsel for Respondent: The Solicitor-General; Mr. Macdonald.

Agents: Messrs. Todds, Murray, and Jamieson.

THE petition prayed the seat on a scrutiny for the Petitioner.

The result of the scrutiny was to leave the Respondent with a majority of two votes.

In the course of the case,

Ballot-paper how to be marked.

Mr. Balfour, for the Petitioner, objected to several ballot-papers, on the ground that the cross, although put on the right-hand side of the candidate's name, was not put in the precise place required by the Ballot Act.*

Lord NEAVES.—I do not think this is a good objection. The first question is whether there has been a deviation from the statute. Now I cannot see that any definite amount of space

* The Act directs that "the voter . . . . . shall place a cross on the right-hand side opposite the name of each candidate for whom he votes." See Sch. 2. *Form of directions for the guidance of the voter in voting.*

with reference to the name is an absolute essentiality in the ballot-paper. The other question is whether the mark is such as to suggest the possibility of fraud. I do not think that the objection on either ground is good, and therefore I think the papers were properly counted.

Mere clumsiness not a sufficient ground for rejecting ballot-paper.

Upon certain ballot-papers being objected to as containing either marks separate from the cross, or badly formed crosses,

Lord NEAVES said, "There are matters that run into each other so much that it is impossible to lay down any clear and broad principle, and I think I must follow the maxim, '*De minimis non curat Prætor.*' I am not disposed to disqualify a voter for a trifling thing such as a spot or a dot on his voting-paper. No. 1,089 has the appearance of a speck or dot; but I shall hold it to be a good vote. Nor is mere clumsiness sufficient to disqualify. Further, there may be vacillation to a certain extent in the hand, and the voter may go back on one leg of his cross to make it more complete, and so to give it the appearance of a double stroke; but I cannot disqualify on that ground unless I see so much deviation from what an ordinary and rather rough writer would be able to do. No. 534 has a thick and clumsy line; but it appears to me to be nothing more than a blunder in the mode of forming the cross. But Nos. 550 and 430 I disallow; I think it is too uncertain what the intention of the voters was, to sustain either."

Costs.

At the close of the inquiry,

The Solicitor-General moved for the Petitioner to pay the Respondent's expenses.

Mr. Balfour opposed the motion.

Lord NEAVES.—"This is a matter of discretion; but, on the whole, I think the correct course is to give expenses to the party who was in possession of the return, and who has maintained his position."

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